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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951

**No. 282**

**SWIFT & COMPANY, Appellant,**

v.

**THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.**

**On Appeal from the United States District Court for the  
Northern District of Illinois.**

**BRIEF FOR THE APPELLANT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951

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No. 282

SWIFT & COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.

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On Appeal from the United States District Court for the  
Northern District of Illinois.

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**BRIEF FOR THE APPELLANT**

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**OPINIONS BELOW**

The district court wrote no opinion. The majority and dissenting views to the report of the Interstate Commerce Commission (R. 57-89) appear at 274 I. C. C. 557.

**JURISDICTION**

The final judgment of the three-judge district court was entered on June 21, 1951 (R. 210). The petition for appeal was presented and allowed on July 26, 1951 (R. 210-211). The jurisdiction of this Court rests on 28 U. S. C. (Supp. IV) 1253 and 2101(b). Probable jurisdiction was noted on October 15, 1951 (R. 228).

## QUESTIONS PRESENTED

The principal questions presented by appellant's assignment of errors (R. 212-217), may be formulated as follows:

1. Whether the Interstate Commerce Commission's ruling that the extra switching charge for livestock delivered to appellant's sidetrack was reasonable can be supported, in the absence of any findings of fact or evidence relative to the reasonableness of such charge by comparison with other commodities delivered to the same sidetrack, or by comparison with livestock delivered to the Union Stock Yards, a few city blocks beyond said sidetrack.

2. Whether the Interstate Commerce Commission may lawfully sanction a high additional charge for switching service in respect of a single commodity to a particular sidetrack, which service it asserts would lead to interference with and disruption of terminal transportation operations, where it refrains from prohibiting such switching service altogether, where it cancels as "not just and reasonable" a proposal by a carrier to exempt that particular commodity from transportation altogether, and where it permits the identical service by the same carrier without such additional switching charge in respect of the same commodity consigned to a stockyard on the same line of railroad, a few city blocks distant from the same sidetrack.

3. Whether the extra switching fee for livestock delivered to appellant's sidetrack violates Section 1(5) of the Interstate Commerce Act, because it bears no relationship to the cost of the switching involved, and was designed and understood to be a penalty to prevent indirectly the precise kind of livestock deliveries which the Interstate Commerce Commission refused to permit the carrier concerned to discontinue directly.

4. Whether the extra switching fee for livestock delivered to appellant's sidetrack, which is not exacted in respect of

any other commodity delivered to the same location, violates Section 3(1) of the Interstate Commerce Act because unduly and unreasonably prejudicial to livestock.

5. Whether the extra switching charge for livestock delivered to appellant's sidetrack violates Section 2 of the Interstate Commerce Act, because, by comparison with livestock delivered to the Union Stock Yards, distant only a few city blocks, it results in different rates for shipments of the same commodity, over the same line, for the same distance, and under the same circumstances of carriage.

6. Whether the extra switching charge for livestock delivered to appellant's sidetrack violates Section 1(9) of the Interstate Commerce Act, because, not being assessed in respect of other commodities delivered there, nor in respect of livestock delivered to the Union Stock Yards, distant only a few city blocks, it prevents the switch at appellant's siding from being operated without discrimination.

7. Whether either present or future congestion at a terminal justifies factual discrimination against a single consignee in respect of a single commodity at a particular sidetrack, which discrimination would otherwise be prohibited by Sections 3(1), 2, and 1(9) of the Interstate Commerce Act.

8. Whether an extra switching charge for delivering a particular commodity at a particular shipper's sidetrack can be justified on the ground of the increased congestion of terminal facilities which such deliveries would involve, where such extra switching charge is not demanded for other commodities to the same sidetrack or for any commodities at other sidetracks in the same terminal area, nor for the same commodity delivered to a stockyards a few city blocks beyond the same sidetrack.

9. Whether an extra switching charge for delivering a particular commodity at a particular shipper's sidetrack

can be justified on the ground that, if such deliveries are permitted without extra switching charge, other shippers of the same commodity might thereafter make demand for similar service to their sidetracks.

10. Whether, on the whole record, there was substantial evidence to support the Interstate Commerce Commission's finding that appellant's direct shipments of livestock, averaging some 18 cars daily, would result in disruptive congestion in terminal operations in the Chicago stock-yards area.

11. Whether the Interstate Commerce Commission erred in relying on the Chicago Junction's dwindling motive power, its settlement of a labor controversy with its employees, and its trackage arrangements with line-haul carriers, to justify the high additional fee for switching service to the appellant's sidetrack in respect of livestock only.

12. Whether the Interstate Commerce Commission erred in failing to take steps within its power to alleviate the existing congestion.

13. Whether the Interstate Commerce Commission had power to, and whether it did, enforce a covenant whereby the carrier leasing the Chicago Junction undertook to operate that road for "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards, the effect of which, as reflected by the present record, was to require the Chicago Junction to deny normal transportation service to the appellant at its sidetrack of one commodity only, except at a high additional charge, in consequence of which appellant would become obliged either to accept and pay for non-transportation services from the Yards which it neither desired or requested but without which it could not obtain the shipments of this one commodity which it owned, or else become obliged to incur additional substantial expense to obtain those shipments by truck.

14. Whether the Interstate Commerce Commission unlawfully preferred delivery of livestock to the Union Stock Yards over delivery of livestock to appellant's sidetrack, and whether in so doing it in fact enforced the covenant above-mentioned.

15. Whether the Interstate Commerce Commission erred in giving controlling weight to shipping practices at the Union Stock Yards which originated at a time when appellant and other packers were financially interested in those Yards, and before appellant and the other packers were required by suit under the antitrust laws to divest themselves of all stockyards holdings.

### STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and related statutes involved on this appeal are set out in Appendix A, *infra*, pp. 142-149.

## STATEMENT

The present controversy arises out of the attempt of the appellant, Swift & Company (hereinafter called Swift), to receive its own livestock at its own sidetrack in Chicago at the normal line-haul rates prescribed by the Interstate Commerce Commission for that commodity.

Swift filed a complaint with the Commission against the Chicago Junction and some twenty-odd line-haul carriers serving Chicago (R. 50-56). In that complaint it sought an order which would require those carriers to deliver Swift's direct shipments of livestock—i. e., animals purchased by Swift in the producing areas, shipped to its plant for processing, and owned by it during transit—to its own sidetrack, which was connected with the rails of the Chicago Junction Railway, at the same flat line-haul rates under which the railroad defendants deliver livestock to the unloading pens of the Union Stock Yard and Transit Company of Chicago (hereinafter referred to as Union Stock Yards), also located upon the rails of the Chicago Junction Railway, only a few city blocks beyond Swift's sidetrack, and at the flat line-haul rates which are similarly applicable to the delivery of all line-haul freight other than livestock to the same Swift sidetrack.

The relative location of Swift's private sidetrack, the Union Stock Yards, and the tracks of the Chicago Junction Railway, is shown on a map, Appendix B, p. 150, *infra*.<sup>1</sup>

After Swift's complaint was filed, the Chicago Junction Railway filed schedules proposing (R. 59) "to specifically exempt livestock from the traffic which it will transport and to cancel the application on livestock of all switching charges published by it, except to and from chutes and sidings at the Union Stock Yards." Upon protest by Swift and others, the operation of the proposed schedules was

<sup>1</sup> This map is derived from Ex. 1, R. 1040 (map showing Swift's proposed new plant); Ex. 2, R. 1041 (map showing Chicago Junction tracks within stockyards area); and Ex. 14, R. 1092 (map of Ashland Avenue yards, Chicago Junction Ry.).

suspended. Thereafter the Commission after proceedings which are detailed below, *infra* pp. 35-37, determined Swift's complaint and the Investigation and Suspension case on the same record. It filed a report, and entered an order dismissing Swift's complaint and requiring cancellation of the Chicago Junction Railway's suspended schedules.

The Chicago Junction took no further steps to put its schedules into force, but Swift brought an action pursuant to 28 U. S. C. (Supp. IV) 1336, 1398, 2284, and 2321-2325, to enjoin, set aside, and annul the Commission's report and order in the complaint case (R. 1-90). The carriers, the Union Stock Yards, and certain other interested parties intervened as defendants (R. 97-138). The district court dismissed the complaint (R. 210), without opinion, and this appeal followed.

The basic facts of record, as hereinafter set forth, are substantially undisputed; the differences between the parties relate primarily to the deductions and conclusions to be drawn from those facts, particularly with reference to future consequences of proposed action.

#### **A. The economics of direct shipments of livestock.**

As has been indicated, the only shipments of livestock herein involved are the so-called direct shipments, being livestock purchased by Swift in the producing areas and owned by it prior to rail transportation, as distinguished from livestock owned and shipped by producers to the Union Stock Yards at Chicago for sale there on commission. The latter shipments are not in issue here, though the difference between them and the direct shipments reflects the economic factors and conflicts which underlie the legal issues in this case.

Three salient trends condition the present controversy.

First, in the years following the First World War, the packing industry became greatly decentralized. Plants

were established in the regions where livestock was actually produced, and, in order to meet this competition, existing Chicago packers decentralized also, and reduced their Chicago operations correspondingly (R. 390-398, 407, 1006-1010, 1026-1028; see Ex. 55 at R. 1897-1928). Swift, which had three pork packing plants in Chicago in 1920, now has only one there (R. 403, 1009), and kills only half a million hogs annually in Chicago as against two million previously (R. 1019). By way of replacement, however, Swift now has four packing plants in Iowa (R. 395-396), and some 35 all told throughout the country (R. 415-416). This trend is not restricted to Swift alone, but affects all of Chicago. Cudahy now has no packing plants there (R. 376). Total slaughtering in Chicago declined from 14,028,431 head of livestock in 1923 to 7,522,397 in 1947, or a decrease of 46.4% (Ex. 43 at R. 1654-1657), while slaughtering in the producing regions has risen correspondingly (R. 390; Ex. 55 at R. 1910).

Second, over the same period there has been a phenomenal rise in direct marketing of livestock, *i. e.*, in livestock being sold directly by the producer to the packer, rather than being consigned to a public stockyards for sale on commission. This rise is attributable, basically to "the economics of the packing houses located elsewhere than at the terminal markets" (R. 1016), which bought their livestock in the producing regions; after that, the Chicago packers had to do likewise in order to remain competitive (R. 1006-1010, 1026-1028). Here are the comparative figures showing percentage of direct sales to total sales (R. 1011, 1026; Ex. 55 at R. 1899):

	1923	1946
Hogs	24.0%	64.4%
Sheep	14.63%	41.8%
Calves	13.98%	40.7%
Cattle	10.4%	25.5%

The larger packers make their direct purchases at buying stations in livestock territory (R. 391, 415, 718). The producers are able to bargain with assurance because of their access to market quotations which are made available by radio several times during the day (R. 848-849, 854-855, 865, 876, 879).

Both of these trends substantially reduced the business of the appellee Union Stock Yard and Transit Company of Chicago. Receipts of cattle, calves, hogs, and sheep at the Union Stock Yards, which aggregated 18,475,818 head in 1923 (Ex. 46 at R. 1848), had fallen to 6,646,705 head in 1947 (Ex. 43 at R. 1679; Ex. 26, not printed). This is a decline of 64%.<sup>2</sup>

And third, the large packers, including Swift, which prior to 1920 had been financially interested in the Union Stock Yards, were required by the antitrust decree of that year (Par. "Second" in Sub-Ex. 62 of Ex. 42, R. 1458, 1460) to divest themselves of their holdings in the Yards. The result was that Swift became, as one witness put it (R. 738), "a competitor that originally was one of our partners."

The present record contains voluminous evidence bearing on the relative advantages and disadvantages to all concerned of direct versus commission purchasing of livestock (R. 390-417, 708-824, 847-891, 908-930, 943-951, 1005-1031). Undoubtedly each producer sells "just where I think possibly I can get the most money" (R. 848); in this, as in other activities, "the end of the trail is the pocket-book" (R. 881). It may be that (R. 814) "the greatest mistake that a great many livestock producers are making today is in assuming that they are competent to do their own livestock selling", cf. also R. 715, 753, though an of-

<sup>2</sup> It is suggested in the record that the figures for 1945 and 1946 were not normal, because of OPA and black market conditions obtaining in those years (R. 730, 738). Actually, however, the receipts in those years were higher than in 1947, as follows:

	Head of livestock	Decline from 1923
1945	8,011,008	56.7%
1946	7,181,865	61.1%

ficial summary prepared by the United States Department of Agriculture indicates that direct sales result in higher prices paid the producer (Ex. 55 at R. 1908, 1913, 1915). Undoubtedly, that is one reason for the increase in direct sales, since the producer is obviously under no compulsion to market his livestock through any particular channel.

The commission men charge the packers with having "evaded the market by going out and intercepting hogs in the country" (R. 757); the packers say that unless they buy livestock in the country they will be unable to continue operations (R. 1006-1010, 1013, 1026-1028). It would seem, then, that it is to the advantage of both producers and packers to deal directly, but to the disadvantage of the commission men. For to the extent that direct purchases increase, commission purchases (and commissions thereon) decline; as an officer of one of the interveners testified (R. 744), "Any facilitating of this [direct] movement of livestock, anything that tends to encourage it by making it more profitable or less expensive or anything of that kind would contract,—would tend to contract or reduce the volume coming to the market for sale." This in turn would reduce commissions earned at public stockyards.<sup>3</sup> And counsel for the Union Stock Yards said of the prayer of Swift's complaint seeking sidetrack delivery of livestock at the line-haul rate (Ex. 57, R. 1961):

If the request of Swift is granted, and the other packers demand and are accorded similar treatment (which may be anticipated), the effect will be substantially to destroy the business of the Yard Company.

The foregoing facts are set forth, not because the economic conflict presents a justiciable issue, but simply to

<sup>3</sup> The same witness, an official of the appellee Chicago Live Stock Exchange, which is an association of commission men, testified (R. 753):

Q. That percentage of directs even to Chicago has been constantly growing over the years, hasn't it?

A. Unfortunately, yes.

show how that conflict affects the interests and influences the alignment of the non-rail interveners in this case.

### **B. Means open to appellant for receipt of direct shipments of livestock.**

At the present time, and in the present posture of this case, Swift can receive its direct shipments of livestock, which average 6489 carloads per year (R. 69, 199), in three ways:

- (i) *Consignment to Omaha Packing Co. sidetrack—\$50,000 annually for additional trucking.*

Swift can, and presently does, receive all direct shipments of livestock at the pens of the Omaha Packing Company, a wholly owned subsidiary, on a sidetrack connected with the appellee Chicago, Burlington & Quincy Ry. Co. Such livestock, in accordance with the Commission's decision in *Chicago Live Stock Exc. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 546, 547 (Fdg. 10), 548, is delivered to those unloading pens at the flat Chicago line-haul rate, without the addition of switching or terminal charges (R. 67), and this is so regardless of the identity of the line-haul carrier which brings the shipment to Chicago (R. 286, 836-838, 842-843).<sup>4</sup>

But the Omaha Packing Co. plant pens are some 2½ miles distant from Swift's present meat packing plant, in

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<sup>4</sup> Ever since the Commission's decision in *Omaha Packing Co. v. Chicago, M. & St. P. Ry. Co.*, 37 I. C. C. 378, livestock had been delivered to the Omaha Packing Co. sidetrack on the Burlington rails at the line-haul rate plus the same additional terminal charge then exacted in respect to livestock deliveries to the Union Stock Yards. That charge was held to be neither unreasonable nor unlawful in *Livestock—Western District Rates*, 176 I. C. C. 1, 122-124 (1932) and again in *Chicago Live Stock Exc. v. Atchison, T. & S. F. Ry. Co.*, 197 I. C. C. 463 (1933). It was not until the further hearing in the latter case, *Chicago Live Stock Exc. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 546-548, decided in 1936, that the terminal charge was held to be unreasonable for deliveries both to the Union Stock Yards and to the Omaha Packing Co. sidetrack on the Burlington.

consequence of which further transportation of the livestock, by motor truck through the city streets, becomes necessary. Such additional transportation, as of the time of the hearing before the examiner, cost Swift about \$50,000 a year for the quantity of livestock here involved (R. 67-68).

- (ii) *Consignment to Union Stock Yards—\$129,000 annually for services neither appropriate to nor desired for livestock already owned by the consignee.*

A second available method for the receipt of direct shipments would be for Swift to consign those shipments to itself at the Union Stock Yards. This method involves only payment of the flat line-haul rate to the carrier concerned, but requires Swift, in respect of all livestock so consigned, to pay yardage charges for non-transportation services, simply to march the livestock through the Union Stock Yards into its own packing plant, i. e., for the privilege of recovering its own animals from the stockyard pens (R. 68, 387-388, 426, 428-429).

These yardage charges range from \$16.25 per car on cattle to \$18.75 per car on a single-deck earload of sheep (R. 68), and aggregate, for the shipments here involved, about \$129,000 a year (Cmplt., par. 10(b), R. 19; admitted, R. 104, 128).

The yardage charge is uniform for each animal of the same species arriving by rail (R. 986), and entitles that animal to (a) "the use of a very extensive system of alleys, streets, underpasses, runways, inclines, bypasses and overhead viaducts, all frequently divided by fences and gates for keeping various lots of animals from becoming mixed" (*id.*); (b) "to the use of pens for as many days as it may remain in the yards, without any limit" (*id.*); (c) "to one weighing" (R. 987); and (d) to the recording by yard employees of all changes in the animal's location (*id.*); and moreover (e) "covers a proportional share of the many general expenses connected with the maintenance and op-

eration of the stockyard" (R. 987-988). See also R. 424-426. Thus the yardage fee covers services appropriate and necessary for animals consigned to the Union Stock Yards for sale on commission to a purchaser there. However, with respect to direct shipments, already owned by the ultimate consignee, who desires prompt delivery of his livestock and who is prepared to receive them at his own plant, only a limited use of the runways (Ex. 2, R. 1041; Ex. 61, not printed) is required, and the other services are neither needed nor desired (R. 264). But this Court held in *Swift & Co. v. United States*, 316 U. S. 216, sustaining the Commission's order in *Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179, that rail transportation ended with the unloading of the livestock at the Union Stock Yards, and that the Commission lacked jurisdiction to regulate the yardage fees thereafter assessed.

(iii) *Consignment to own sidetrack*—\$254,000 annually for switching charges.

Swift now has a private sidetrack, which is connected to the rails of the Chicago Junction Railway by a switch presently in operation (R. 65, 268, 270-271, 276-277; Exs. 2-4, 6, 8, R. 1041-1045). At this location, Swift proposes to build a new packing plant, to replace existing obsolescent and inadequate facilities, which will have substantial facilities for unloading livestock brought by rail, as well as adequate holding pens (R. 65; see Ex. 1, R. 1040).<sup>5</sup>

But for the delivery of its own livestock at this sidetrack over the switch now in operation, Swift must pay the extra switching charge which is in issue in this case, and which is presently \$39.24 per car<sup>5</sup>—i. e., \$39.24 per car in excess of

<sup>5</sup> The following is the history of the Chicago Junction switching rate on livestock consigned to sidetracks since February 1, 1921:

(a) On February 1, 1921, a tariff of the Chicago Junction Railway (the Chicago River and Indiana R. Co., Lessee) published a proportional switching rate of 2¢ per 100 lbs., subject to a minimum weight of 60,000 lbs. Thus the switching charge was \$12.00 per car, and it stood at that level at the time the *Hygrade* litigation began (*Hygrade Food Products Corp. v. Atchison, T. &*

what Swift now pays for the identical delivery of all other classes of freight to the same sidetrack (R. 288-289, 370), and similarly \$39.24 per car in excess of the line-haul rate for delivery of livestock to the Union Stock Yards, distant a few city blocks from the same sidetrack. See *infra*, pp. 15-17. The result is that if Swift employed this third method, and consigned to its own sidetrack all of its direct shipments of livestock, it would pay on the average \$254,628.36 per year under the Commission's order and the ruling of the court below.

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*S. F. Ry. Co.*, 195 I. C. C. 553, sustained, *Atchison, T. & S. F. Ry. Co. v. United States*, 8 F. Supp. 825 (S. D. N. Y.), reversed, *Atchison, T. & S. F. Ry. Co. v. United States*, 295 U. S. 193.

(b) On September 20, 1933, the rate became 3¢ per 100 lbs., and \$18.00 per car pursuant to *Switching Rates in Chicago Switching District*, 177 I. C. C. 669.

(c) On January 19, 1939, the rate became 3¼¢—\$19.50 per car—in consequence of *Fifteen Percent Case, 1937-38*, 226 I. C. C. 41.

(d) On March 18, 1942, the rate became 3½¢—\$21.00 per car—pursuant to Commission approval in *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545 (Ex Parte No. 148).

(e) On May 15, 1943, the rate again became 3½¢ per 100 lbs. and \$19.50 per car, in consequence of a ruling in which the authority in the original report, 248 I. C. C. 545, was suspended. *Increased Railway Rates, Fares, and Charges, 1942*, 255 I. C. C. 357.

(f) On July 1, 1946, the rate rose to 3.7¢ per 100 lbs. and \$22.20 per car, pursuant to *Increased Railway Rates, Fares, and Charges, 1946*, 264 I. C. C. 695 (Ex Parte No. 162).

(g) On January 1, 1947, the rate became 4¢ and \$24.00 per car, in consequence of *Increased Railway Rates, Fares, and Charges, 1946*, 266 I. C. C. 537; this was the rate when the present complaint was filed with the Commission (R. 52).

(h) On October 13, 1947, the basic rate remained 4¢, but the charge based on that rate was increased 10%, making the cost per car \$26.40; this followed from *Increased Freight Rates, 1947*, 269 I. C. C. 33 (Ex Parte No. 166).

(i) On January 5, 1948, the charge superimposed on the basic 4¢ rate was increased to 20%. *Increased Freight Rates, 1947*, 270 I. C. C. 81. This made the switching charge \$28.80 per car, which is where it stood when the present proceeding was heard by one of the Commission's examiners (R. 60, 232, 289, 838).

(j) On May 6, 1948, the rate became 5½¢ per 100 lbs. and \$33.00 per car. *Increased Freight Rates, 1947*, 270 I. C. C. 93.

(k) On May 11, 1948, the rate was reduced to 5¢ per 100 lbs. and \$30.00 per car; this was published voluntarily by the carriers in an effort to comply

### C. Scope of the switching charge in question.

As has been indicated, the switching charge of \$39.24 per car now in issue applies only to livestock consigned to sidetracks such as Swift's, located on the tracks of the Chicago Junction Railway (R. 288-289, 370).

#### (i) *Inapplicability to livestock consigned to Union Stock Yards.*

There is no similar switching charge on livestock consigned to the Union Stock Yards (R. 289), which are also located on the Chicago Junction, and this is so notwithstanding the circumstance that the distance from the several railroad appellees' break-up yards to the Ashland Avenue yards of the Chicago Junction is precisely the same whether a particular car of livestock is consigned to the Union Stock Yards or to Swift's sidetrack (R. 283), and notwithstanding the circumstance that the distance from the Ashland Avenue yards to the Union Stock Yards is

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with the Commission's order in 270 I. C. C. 93, *supra*, as it was thought that the 5½¢ rate did not comply.

(l) On July 12, 1948, in another effort by the carriers to comply with 270 I. C. C. 93, the rate became 5¼¢ per 100 lbs. and \$31.50 per car.

(m) On January 11, 1949, the basic rate remained 5¼¢, but it was increased by 6%, making the charge per car \$33.39. *Increased Freight Rates, 1948*, 272 I. C. C. 695 (Ex Parte No. 168).

(n) On September 1, 1949, the rate was increased to 6¢ per 100 lbs. and \$36.00 per car. *Increased Freight Rates, 1948*, 276 I. C. C. 9. This was the rate in effect at the time of the proceedings in the district court. (Complaint, pars. 4(a), 8(a), 8(b), 10(a), 15, 20, R. 2, 11, 13, 18, 25, 28; Statement as to Jurisdiction, pp. 5, 8, 11, 12.)

(o) On August 28, 1951, the 6¢ rate became subject to a 9% increase, pursuant to Commission approval in *Increased Freight Rates, 1951*, 281 I. C. C. 557 (Ex Parte No. 175). This made the switching charge \$39.24 per car, which was the rate in effect while this brief was being written.

*Addendum:* On January 14, 1952, Division 2 of the Commission (Commissioners Aitchison, Splawn, Alldredge, and Mahaffie) commenced hearings in supplemental proceedings in Ex Parte No. 175 to consider the railroads' contentions that increased costs require that the full 15% increase therein requested, which was granted only in part in 281 I. C. C. 557, be now granted to the extent then denied.

somewhat longer than from the Ashland Avenue yards to the Swift sidetrack (R. 284, 684-685; and see map, Exhibit B, *infra*, p. 150).

Moreover, when livestock is delivered at the Union Stock Yards, the line-haul carriers absorb an unloading charge of \$2.08 per double-deck car and \$1.73 per single-deck car, while when livestock is delivered at private sidetracks, as at Swift's Omaha Packing Co. plant or at the proposed new plant, all unloading costs are borne by the consignees and not by the carriers (R. 301). This follows from the terms of Section 15(5) of the Interstate Commerce Act (*infra*, p. 145), and from the Commission's ruling in *Omaha Packing Company v. Atchison, T. & S. F. Ry. Co.*, 66 I. C. C. 44, applying that provision.

(ii) *Inapplicability to other commodities delivered at Swift's sidetrack.*

There is no switching charge on any commodity other than livestock delivered at Swift's sidetrack; such other commodities are delivered at the flat line-haul rate (R. 286, 370). Commodities so delivered without switching charge include (Ex. 10, at R. 1058-1060) live poultry, eggs, fresh fruits, meats, and vegetables, liquid milk, dressed poultry, ice, butter, and cheese—among a host of others.

(iii) *Switching charge not dependent on distance between Chicago Junction yards and line-haul carriers' break-up yards.*

The Chicago Switching District is over forty miles in length, from seven to fifteen miles wide, and over 600 square miles in extent; within its boundaries are over 4,000 private industries served by thirty-five railroads and more than 5,000 miles of track. See *Switching Rates in Chicago Switching District*, 177 I. C. C. 669, 675-676, 712-713; and see map, Ex. 9, R. 1046.

Subject to certain restrictions, not otherwise shown in the record, all carload freight transported to Chicago by the line-haul carriers is delivered to any industrial location within the Chicago Switching District at the flat Chicago line-haul rates without the addition of other switching or terminal charges, and this is so regardless of the distance between the line-haul carriers' break-up yards and the industrial siding in question (R. 280-283, 286-288, 298-299, 368-369).

Thus eggs, for instance, consigned to Swift's sidetrack from distant break-up yards, such as the Bensenville Yard of the Milwaukee Road and the Proviso Yard of the Chicago & North Western, both in the northwest portion of the Switching District, or from the Burr Oak Yard of the Rock Island in the southwest portion, involve no greater transportation expense to the shipper than if they were consigned there from reasonably adjacent yards, such as the Western Avenue Yard of the Burlington, the Corwith Yard of the Santa Fe, or the 47th Street Yard of the Wabash (R. 280-283).

But livestock transported over the same distances, long or short, involves the \$39.24 switching fee for each car (R. 288-289, 370)—not for the entire movement, but only for the switching done by the Chicago Junction in moving the car in question from its own Ashland Avenue yard to the Swift sidetrack (R. 838). See map, Ex. 9, R. 1046, and map, Appendix B, *infra*, p. 150, for the relative distances involved.

#### **D. Transportation of livestock to consignees in the stock-yards district.**

##### *(i) Route followed and switching performed.*

Consolidated trains containing livestock and dead freight arrive at the several carriers' outer break-up yards in the Chicago Switching District (R. 609, 634-635, 649-650, 675-676, 692). Only rarely does any train carrying livestock exclusively arrive at those yards (*cf.* R. 609, 634, 649, 675,

692). Frequently some switching has already occurred before the trains reach Chicago (R. 634-635, 649, 675-676). On arrival, the cars of livestock and dead freight are separated at the break-up yards, those reflected in the record being the following: the Hawthorne Yard of the Burlington, entrance at Clyde, the yard being 9.3 miles distant from the Ashland Avenue Yards of the Chicago Junction (R. 609); the Proviso Yards of the Chicago & North Western, 18 miles distance (R. 69); the Burr Oak Yards of the Rock Island, 14 miles away (R. 70, 650); the Bensenville Yards of the Milwaukee Road, some 27 miles away (R. 69); and the Corwith Yard of the Santa Fe, 3 miles away (R. 692-693).<sup>6</sup> Similar separations occur at the break-up yards of the other line-haul carriers.<sup>7</sup>

The loaded freight cars then are moved to consignees on the Chicago Junction's tracks in three ways:

(a) Trains of livestock cars only, destined to the Union Stock Yards, are hauled directly to those yards by a line-haul carrier's engine (R. 62-63, 70). When the train comes from the west, the engine goes over east-bound track 1103 to the unloading chutes. While the cars are being unloaded, the engine cuts off, passes around the train, couples on to the other end, and then hauls the empty cars over west-bound tracks 1102 or 1104 to the line-haul carrier's break-up yard (R. 62-63). These trains, of livestock cars only, do not pass through the Junction's Ashland Avenue yards (R. 63, 70).

(b) Trains of dead freight only, consigned to industry tracks on the Junction, are delivered by the line-haul carriers to the 9 receiving tracks in the Ashland Avenue south yard; under the terms of a labor agreement, set forth in greater detail below, pp. 24-25, such cars may not be de-

<sup>6</sup> The figure "5" at line 29 of R. 69 is a misprint, as appears from inspection of the original record and from line 5 of 274 I. C. 567; they show "3 miles".

<sup>7</sup> Counsel for the railroad appellees called operating witnesses from only 5 carriers out of the 22 he represented in order to avoid repetitiousness (R. 687).

livered elsewhere. After delivery, and after completion of the necessary inspection and carding by the Junction, the cars are switched at intervals by Junction break-up crews to the adjoining classification tracks for regrouping and movement to base yards serving the respective operating districts (Ex. 13, R. 1091). There the cars are reclassified and switched to team tracks or to the private sidings of the consignees. (R. 61.)

(c) Consolidated trains consisting of livestock for the Union Stock Yards and dead freight for industry sidetracks on the Junction, are handled as follows (R. 63): In such trains, the dead freight is on the head and behind the engine. The cars of livestock are cut off and left standing at the eastern end of the east-bound running track while the line-haul carrier's engine sets the dead freight on one of the 9 receiving tracks in the Ashland Avenue south yard. The engine then returns and hauls the livestock to the Union Stock Yards. The line-haul engine then disposes of the empty livestock cars as in (a) above, while the dead freight is switched by Junction motive power to the proper industry sidetracks as in (b).

(d) If livestock were to be delivered to Swift's sidetrack, the initial movement, from the point of origin to the line-haul carrier's break-up yard to the stockyards area, would be precisely the same as for livestock destined for the Union Stock Yards (R. 283-285, 476-478, 480-483, 505, 506-507, 684-685). Thereafter, consolidated trains would proceed to the eastern end of the Ashland Avenue Yards, as at present, with (1) livestock for the Union Stock Yards, (2) dead freight for Junction sidetracks, and (3) livestock for the Swift sidetrack. At that point, the dead freight and the livestock for the Swift sidetrack would be pushed onto one of the Junction receiving tracks and left there for subsequent delivery by Junction motive power, while the line-haul switching engine would proceed immediately to the Stock Yards with the livestock consigned there. The sub-

sequent delivery of Swift's livestock to its own sidetrack would be effected just as dead freight is delivered there now (R. 66-67, 238-239).

(ii) *Percentage of mixed trains; incidence of trains composed of one and two cars of livestock.*

A train, in railroad parlance, means any movement of an engine with one or more cars attached (R. 674, 945). To the extent, therefore, that short trains are involved, the percentage of trains does not accurately reflect the volume of livestock carried.

The record indicates that approximately 63% of the trains of the line-haul carriers going to the Union Stock Yards handle livestock exclusively (R. 62). The record also indicates that, in order to comply with the Federal law limiting the time that livestock may be confined in cars without unloading for watering and feeding (45 U. S. C. 71-74; *infra*, pp. 147-149), many trains going to the Union Stock Yards which carry livestock exclusively are composed of only one or two cars (R. 64).

The record shows the shipments of short-time livestock over a test period of about three weeks (Ex. 45, R. 1681-1842): 80% of the trains involved contained only one or two cars, with the consequence that, in respect of those short-time shipments, 80% of the trains carried only about 56% of the short-time livestock.<sup>8</sup> The short-time trains in question, which averaged 1.96 cars per train, amounted to 46.2% of the total livestock receipts at the Union Stock Yards during the test period (R. 825). Thus more than one-third of the livestock received at the Union Stock Yards in that time arrived in trains averaging less than two cars of livestock per train. The present record does not permit of more exact computations, nor does it indicate how far the cited percentages can be accurately projected. But the

<sup>8</sup> Ex. 45, R. 1681-1842, lists 574 trains, aggregating 1124 cars. Of these 574 trains, 292 contained only a single car.

figures are believed sufficient to establish that the incidence of short trains, required to comply with the 28-hour law, is so high that, although 63% of the trains going to the Union Stock Yards handle livestock exclusively, substantially less than 63% of the livestock destined there arrives in such trains. Or, otherwise stated, well over 37% of the livestock consigned to the Union Stock Yards arrives in consolidated trains.

(iii) *Transportation of livestock to Swift's Omaha Packing Co. plant.*

Livestock consigned to Swift's Omaha Packing Co. plant pens on the sidetrack off the Burlington lines, averages some 18 or 20 cars every day in the aggregate (R. 63, 75). Around 45% of these shipments arrive via the Burlington, while the balance originate on other lines (Ex. 36, R. 1161). And the Commission found (R. 69) "that the blocking out in outer yards of direct shipments consigned to the Omaha plant pens is a minor operation which, except as to the Burlington, averages but one or two cars per day, or less, for the individual lines." None of the shipments consigned to Swift at its Omaha Packing Co. plant move through the Ashland Avenue yards of the Chicago Junction (R. 70).

**E. Congestion on Chicago Junction tracks.**

The Ashland Avenue yards of the Chicago Junction handled an average of 726,144 loaded and empty cars per annum during 1945-1947 (R. 60), and now receive an average of about 1000 loaded cars per day (R. 61). But the record shows that the number of cars of livestock transported over the Chicago Junction's tracks to the Union Stock Yards has markedly decreased since 1920.

In the early 1920s, over 250,000 cars of livestock were transported annually to the chutes of the Union Stock Yards, with a high in 1923 of 303,228 cars (Ex. 46 at R. 1845). After that time the number declined; here are the

figures for the last three years shown (Ex. 46 at R. 1846; Ex. 28, R. 1117; R. 996):

YEAR	CARLOADS	DECREASE SINCE 1922	
		PER CENT	CARLOADS
1945	83,457	72.4	219,771
1946	65,139	78.5	238,089
1947	53,561	82.3	249,667

The Chicago Junction's trackage has remained the same since 1909, including the single running track, No. 1103, from west to east (R. 62, 461, 523). Since all line-haul carriers must use the same east-bound track into the Union Stock Yards, any delay to a train on that track results in a piling up of other trains. Frequently, as many as four trains must wait to enter this track because of blockage at the east end. Delays are also experienced because of "set outs" made by consolidated trains; in the case of such trains, the livestock remains on the single east-bound running track while the engine puts the dead freight on another track, and this blocks the running track until the engine returns and hauls the livestock into the Union Stock Yards. (R. 62-63.) On occasion this blocks eight or ten lines bringing trains from the west (R. 489). Moreover, the line-haul engines coming to Ashland Avenue from the west must pull through to the east end to leave the cars of dead freight, while those reaching it from the east must pull through to the west to leave the dead freight and then return over the single east-bound track (R. 63, 70, 452-453, 512-513, 649-650, 658-659, 669).

The Commission found that, during a test period in December 1947, the time per car consumed between delivery to the Junction of 511 cars of perishable freight and 1570 cars of other dead freight, by connecting lines at the Ashland Avenue south yards, and actual or constructive placement at sidetracks on the Junction, was 23 hours 30 minutes for perishable freight and 31 hours 48 minutes for other dead freight (R. 68).

The evidence bearing on the effect of the foregoing operations on transportation of livestock to sidetracks is set out below, pp. 29-34, after the evidence dealing with the other factors relevant to congestion has been summarized.

**F. Factors other than volume of traffic contributing to congestion on Chicago Junction tracks.**

Briefly, the rail system now known as the Chicago Junction Railway was originally operated by the appellee Union Stock Yard and Transit Company of Chicago as a portion of its livestock receiving facilities. After this Court's decision in *United States v. Union Stock Yard*, 226 U. S. 286, the management of the railroad and the stockyards portions was separated, see *Union Stock Yard Co. v. United States*, 308 U. S. 213, 215-216, and in 1922 the railroad portion, then as now named the Chicago Junction Railway, was, with the approval of the Interstate Commerce Commission, leased by a wholly owned subsidiary of appellee New York Central Railroad Company. See *Chicago Junction Case*, 71 I. C. C. 631.<sup>9</sup> Since that time the Chicago Junction has been operated as a part of the New York Central System, though Union Stock Yards still owns the fee of the railroad facilities. See *Union Stock Yard Co. v. United States*, 308 U. S. 213; see also, for full details of the corporate structure of the Stock Yards interests, *Chicago Stock Yards Co. v. Commissioner of Internal Revenue*, 129 F. 2d 937 (C. C. A. 1), reversed on other grounds *sub nom. Helvering v. Stock Yards Co.*, 318 U. S. 693.

<sup>9</sup> For related proceedings, see *Chicago Junction Case*, 264 U. S. 258; *Chicago Junction Case*, 150 I. C. C. 32; *Baltimore & O. R. Co. v. Chicago Junction Ry. Co.*, 156 F. 2d 357 (C. C. A. 7); *Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U. S. 519; *Baltimore & O. R. Co. v. Chicago River & Indiana R. Co.*, 170 F. 2d 654 (C. A. 7).

(i) *Decline in Chicago Junction's motive power since its lease by appellee New York Central.*

The Commission found (R. 68) that "The present motive power of the Junction is being operated to capacity," and listed the 35 steam and 12 Diesel engines owned by that carrier. Of the former, 11 are of a type that do not lend themselves readily to industrial work, being too heavy for sharp curves (R. 68). Moreover, 14 of the remaining engines were received from the U. S. Railway Administration during World War I, and thus are at least 30 years old (R. 525).

The record reveals a gradual shrinkage in the Chicago Junction's motive power since it was leased by the New York Central, as follows (Ex. 58, R. 1963-1965):

1923 .....	77 engines
1925 .....	86 engines
1935 .....	64 engines
1940 .....	47 engines.

The Chicago Junction's Superintendent testified that his road did not have sufficient engines to take care of all the industrial placement of cars (R. 524; see also R. 547, 555), and further (R. 525-526), "I know we have been trying to get some additional Diesel equipment. We want at least five of them if we can get them."<sup>10</sup>

(ii) *Effect of 1946 labor agreement.*

Prior to January 1946, the several line-haul carriers delivered their freight cars to the various yards of the Chicago Junction. Thus cars for Armour and Co. were delivered at 47th and Peoria Streets, while lines from the east

<sup>10</sup> See also the testimony of the Rock Island's operating witness (R. 656), "One thing, for example, that undoubtedly is going to add to our troubles is the inadequate supply of switch engines and crews on the Rock Island and other line haul carriers today"; and that of the Milwaukee's (R. 680): "We have an acute shortage of power and men \* \* \*."

and south delivered freight at the Oakley Avenue Yard, or at Loomis Street, or to the Ashland Avenue north yard. None of this freight went through the crowded Ashland Avenue receiving or classification facilities. Similarly, empty cars for loading hogs and sheep eastbound were placed in the North Yard by the eastern lines. But this arrangement, under which cars were delivered by the line-haul carriers to at least four different yards of the Junction, was abrogated by a demand of the Junctions employees. In order to avert a threatened strike by those employees, the Junction agreed that all of the foregoing traffic would be received at the Ashland Avenue south yard, which has but one running track to the east, and that is the arrangement now in effect. (R. 463-464, 515-517; see also R. 443, 494, 527, 539, 699.)

In 1947, the first full year after this change took effect, the Junction used 3800 more crews, each of 5 men (R. 64), in moving its traffic with no increase in the number of cars handled (R. 518-519). Moreover, the restriction of classification work to Chicago Junction employees results in delays farther back; as the Junction's Assistant Superintendent testified (R. 539), "foreign line crews are delayed waiting to set cars out in our receiving yard due to our inability to classify them quickly enough to avoid these delays."

The record also reflects other delays in making shipments by reason of restrictive labor agreements (R. 635, 639-640, 660-661).

(iii) *Operations of line-haul carriers on Chicago Junction tracks.*

The line-haul carriers operate over the Chicago Junction's tracks by virtue of trackage rights (R. 62), exercised, as the Commission found (R. 64), in the following manner:

During a test period from December 1 to 7, 1947, inclusive, there were 1,171 foreign crews moving on the Junction's rails or an average of 167 crews per day.

The average time each crew was on the Junction's tracks was 3 hours 12 minutes. A crew consists of three members in addition to the engineer and fireman. There are no restrictions by the Junction limiting the time within which connecting lines may deliver freight on Junction tracks. They are privileged to and do operate over the Junction's rails at their convenience for the purposes stated above and may be on those tracks at all hours of the day or night.

(iv) *Refusal of Chicago Junction to grant additional trackage rights.*

Mr. R. G. Raasch, Chairman and Tariff Publishing Agent of the Illinois Freight Association, who testified to the existence and scope of the foregoing trackage rights (R. 839, 842), indicated their limitations as well. He said (R. 840):

If the stock were to be moved to the proposed new facilities of Swift & Company, the trunk line carriers do not now have and would not have trackage rights to run into such location with their own engines and crews as they now do at the Union Stock Yards. The trunk line carriers have been advised by the Chicago Junction Railway that they would not be permitted to make such deliveries by use of their own power. \* \* \* Trackage rights would not be granted for that purpose, and it would be necessary for the trunk lines to make such deliveries to the Chicago Junction Railway at the interchange tracks in the Ashland Avenue Yard.

(v) *Union Stock Yards rules directed at dead freight.*

The rules of the Union Stock Yards forbid the line-haul carriers, which bring cars of livestock directly into the chutes there, see p. 18, *supra*, from pulling into those chutes with any cars loaded with dead freight (R. 664, 668-669). The effect of these rules on operations was testified to as follows by one of appellees' operating witnesses (R. 668):

\* \* \* If I had a man leaving Burr Oak of [on?] a 96 with one car of U. S. livestock and one car for C. P. T. [Chicago Produce Terminal?], I have got to set either one of those cars out at our [Rock Island] 47th Street Yard before entering the C. J. tracks and then either let this engine go over and deliver the U. S. Yards stock, unload it and come back and pick up C. P. T. or have another engine there to take that one car of stock over to the yards and unload it and bring the empty back.

Q. Is that a requirement of the C. J. or is—your own operating practice?

A. No, sir, it is an operating requirement of the Stockyards people, U. S. Y. & T. I certainly would like to cancel it if I could. It would save me a lot of trouble.

#### **G. Covenant in Chicago Junction lease and its invocation by Union Stock Yards.**

After Swift had filed its complaint with the Commission, and after the several railroad defendants had answered,<sup>11</sup> counsel for the Union Stock Yards addressed the following letter to counsel for the New York Central (Ex. 57, R. 1961-1962):

WINSTON STRAWN & SHAW  
First National Bank Building  
Chicago 3

September 4, 1947.

Mr. Sidney C. Murray,  
General Counsel,  
New York Central Lines,  
1236 La Salle Street Station,  
Chicago 5, Illinois.

Dear Sir:

In response to a telephone inquiry made by us last week, Mr. W. C. Douglas, Assistant Vice President of the River Road and the New York Central, stated that neither of those companies planned to offer any

<sup>11</sup> The file in I. C. C. Docket No. 29809, the complaint case, indicates that the railroad defendants filed answers on various dates in August, 1947.

evidence or to take any other steps to defend the complaint in Swift & Company vs. The Atchison, Topeka & Santa Fe Railway Company, et al., I. C. C. Docket 29809. In this complaint Swift is asking the Interstate Commerce Commission to compel the line-haul carriers and the River Road to deliver livestock at its plant at rates which do not exceed those charged for delivery of livestock to the unloading pens of The Union Stock Yard and Transit Company of Chicago.

If the request of Swift is granted, and the other packers demand and are accorded similar treatment (which may be anticipated), the effect will be substantially to destroy the business of the Yard Company.

In Article VI of the lease from the Yard Company to Chicago Junction Railway Company dated December 1, 1913, the Junction agreed "to conduct, manage, and operate the line of railroad by this instrument demised, and in so far as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards." In the lease of May 19, 1922, by the Junction to the River Road (see Art. III, Sec. 2, and Art. IX), the River Road and the New York Central undertook to perform the above-quoted covenant of the Junction in the earlier lease.

Most of the evidence necessary to defend the Swift complaint and the power to raise the necessary issues for the determination of all the questions involved are in the possession of the River Road. We believe that if this evidence is adduced, and if the proper issues are raised by that road, the case can be successfully defended.

It is our considered opinion that the River Road and the Central are obligated under the terms of the foregoing provision of the lease of 1913 to defend this case and to take every other step appropriate to prevent irreparable injury to the Yard Company, and that any failure to do so will be a breach of this covenant of the lease.

Yours truly,

WINSTON, STRAWN & SHAW.

Thereafter, the New York Central and the River Road separately appeared by counsel and defended the complaint case before the Commission's examiner (R. 250), and, in due course, the New York Central and the River Road intervened and filed answers in the action brought in the court below (R. 97-124). Also, after the foregoing letter was written, the Chicago Junction on November 19, 1947,<sup>12</sup> proposed specifically to exempt livestock from the traffic which it will transport and to cancel the application on livestock of all switching charges published by it, except to and from chutes and sidings at the Union Stock Yards (R. 59).

#### **H. Evidence bearing on effect of granting appellant's prayer for relief.**

The evidence relative to the possible effect of granting Swift's prayer for relief covers what is factually the most controversial aspect of the present case. But even this aspect can be broken down to show the uncontradicted elements.

##### *(i) Effect of appellant's shipments alone.*

The Commission found that (R. 74-75), "Having in mind the congested condition of yards and tracks, it is clear that the attempt to make plant delivery through and over them of even 18 cars of livestock daily would considerably delay and burden defendants' operations." A discussion of the evidence of record, if any, bearing on this finding would necessarily be argumentative, and hence it is postponed to Point III C, pp. 99-104, below.

The Commission then went on to consider the possibility that other packers would be entitled to the same relief, and proceeded to deal with the case on the basis of congestion believed to result on that footing (R. 76). The following sections set out the evidence of record reflecting the attitude of the other packers, the assumptions underlying the

<sup>12</sup> This date appears in the file of the Commission's Investigation and Suspension Docket No. 5543.

railroad witnesses' prognostications of threatened congestion, and the direct testimony as to such congestion.

(ii) *Position of the other packers.*

Since before 1915, Swift has used the Omaha Packing Co. sidetrack on the Burlington line and has received and unloaded its direct shipments of livestock there at the same rate applicable to deliveries of livestock to the Union Stock Yards, except for absorbing the expenses of unloading. See *Omaha Packing Co. v. Chicago, M. & St. P. Ry. Co.*, 37 I. C. C. 378; *Omaha Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 66 I. C. C. 44; *Chicago Live Stock Exc. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 546-548. No other packer has seen fit in all the intervening years to acquire a similar siding off the tracks of a line-haul carrier,<sup>13</sup> use of which would necessarily involve the construction and maintenance of adequate holding pens.<sup>14</sup>

In the so-called "egress" cases, dealing with the packers' demands for receipt of direct shipments of livestock consigned to themselves at the Union Stock Yards without payment of yardage fees, only one small packer was at first concerned. *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553; *Atchison, T. & S. F. Ry. Co. v. United States*, 295 U. S. 193. In the next attempt on the part of a packer to obtain free egress for its own animals, Armour & Company at first pursued an independent course in the courts, see *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, and later joined with Swift in the proceeding which Swift had commenced before the Commission. *Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179; see *Swift & Co. v. United States*, 316 U. S. 216, 217-218. The basis of the

<sup>13</sup> This circumstance caused the Commission to assert (I. C. C. Motion to Affirm, p. 13) that "it would appear that Swift has the preference in Chicago."

<sup>14</sup> Note the requirement imposed by the Commission in this case as a prerequisite to delivery with the switching charge (R. 81), "provided that the tracks to be constructed will be adequate for deliveries by the Junction at its ordinary operating convenience and without interruption or interference \* \* \*"

complaint of Swift and Armour was that, since they owned the livestock being shipped, they were entitled to claim their animals free from any exaction in the nature of yardage fees; their position was, in substance, that a consignee should not be subject to any extra charge for the use of the terminal.

But the rulings were adverse to the plaintiffs; the substance of the holdings in the cited cases was that transportation ended with the arrival of the livestock at the Union Stock Yards, and that yardage fees thereafter imposed were for non-transportation services which the Commission was without power to regulate. This Court none the less pointed out (316 U. S. at 227)—

It does not appear, however, that the existence or adequacy of alternative facilities for delivery at other points is particularly important in the case, because the shipments involved are consigned to the packers at the Union Stock Yards by their own choice. It does not appear that they are demanding an increase of other facilities, and the case has not been considered in that light.

Having failed in its effort to strike down the yardage fees assessed against its direct shipments consigned to the Union Stock Yards, Swift turned its attention to the switching charge assessed on direct shipments consigned to its own sidetrack, and brought the present complaint before the Commission, attacking the high additional switching charge assessed only against livestock delivered to sidetracks.<sup>15</sup> This time Swift stood alone. Armour & Company

<sup>15</sup> The complaint as amended also contained a prayer (R. 56) for the establishment of joint through rates between the line-haul carriers and the Chicago Junction. The merits of that prayer turn in part on the difference between the absorption of a switching rate by the line-haul carrier, which is the general practice throughout the country, and a division of the joint rate, which is the practice in Chicago (R. 293-294, 295, 843-845). Since, however, the basic issue in the present controversy, is, on the Commission's own statement (R. 59), the legality of the switching charge, and since in our view a joint rate which included the switching charge would be equally illegal, we have thought it conducive to clarity to omit all further reference to the establishment of joint rates.

entered an appearance in the related Investigation & Suspension case, but not in the complaint case.<sup>16</sup> And no other packer, large or small, intervened in either aspect of the present case, on either side, before the Commission or in the court below. On the issues now in litigation, Swift still stands alone.

The following is the evidence in the present record directly bearing on the probability of the other packers making similar demands for plant deliveries of livestock at the line-haul rate.

All seven railroad operating witnesses who gave expert testimony as to the consequences which in their view would follow the making of plant deliveries assumed that they would be faced with demands from "all the packers" and that the present proceeding involved all direct shipments of livestock to Chicago (R. 488, 493, 539, 540-541, 544, 548, 618, 636, 640-641, 655, 657, 679, 680, 684, 699). All of these witnesses who were questioned on the point admitted that they had no knowledge whether the other packers would or would not make similar demands, and admitted moreover that they had made no inquiries on that score (R. 514-515, 553, 646-647, 666, 684, 704).

The only evidence in the record tending affirmatively to indicate that the other packers would join in Swift's demand (R. 739, 928, 988) came from witnesses hostile to Swift: Park, the representative of the commission men selling livestock on the Chicago market (R. 708-710), who also testified to the sharp economic conflict between direct sales and commission sales (R. 744, 753); Heinemann, an expert retained by the Union Stock Yards (R. 423, 944), whose associations (R. 908) likewise had an adverse inter-

<sup>16</sup> See R. 251-252: "Mr. Blanchard: Mr. Examiner, I appear in the nature of a special appearance here; Mr. Paul E. Blanchard, representing Armour & Company. \* \* \* We are interested primarily in the I. & S. case. \* \* \* I will enter an appearance in the I. & S. case but not in the formal case unless from the development of the facts and the evidence here it appears that we have some interest in the formal case at a later time. At the present time we know of no such interest."

est (R. 944); and O'Connor, General Manager of the Union Stock Yards (R. 982).

No appellee called any witness connected with any packer, large or small, to adduce direct testimony of what such other packers' attitude might be.

On the basis of the foregoing the Commission concluded (E. 75-76) and found (R. 76) "that, if complainant's demand for the delivery service at the line-haul rates were granted, there would result demands from other packers requiring defendants to render like delivery service \* \* \*."

(iii) *Evidence as to congestion and disruption.*

As has been indicated, every one of the seven railroad operating witnesses who testified as to the effect of the granting of Swift's demand based his answer on the assumption that all the other packers would similarly require and receive plant delivery. *Supra*, p. 32. All of the answers, moreover, because of the circumstance that, in fact, the Chicago Junction has never delivered livestock except at the Union Stock Yards (R. 60), were based not on actual experience but on hypothesis. Indeed, one operating witness frankly said (R. 647), "We are here somewhat on a clairvoyant adventure."<sup>17</sup>

The Chicago Junction witnesses testified, on the assumption of existing operating conditions and on the basis of all direct shipments going to sidetracks, that an additional 1 to 8 hours would be required before cars could be set for unloading (R. 64).

The other witnesses, also on the foregoing assumptions, testified to the congestion which they believed would follow (R. 618-627, 636-645, 655-664, 678-683, 699-703).

<sup>17</sup> The Superintendent of the Chicago Junction likewise testified (R. 469, 490): "If the proposed method were employed it would mean conditions I will have to visualize, it never actually having occurred." \* \* \* "Not having done it I don't know, nor do they know, just how they would handle a consolidated train."

The Commission found that it would be physically possible to make the desired delivery to Swift, and in its report detailed at some length the procedure for such delivery (R. 66-67, 72-74). Laying considerable stress on the circumstance that livestock can not be "kicked" (R. 72-73), the Commission concluded that direct deliveries of direct shipments of livestock "would result in serious disruption of operations and services and serious delays in the delivery of livestock" (R. 71); that "a substantial movement of livestock by the Junction would adversely affect efficient and expeditious terminal operations generally and that operations would be disrupted if much of the large movement of livestock to the stockyards area and the return movement of the empty cars, were performed by the Junction" (R. 71); that while "any cars of livestock consigned to [Swift] could be handled in consolidated trains by grouping such cars at the head of the train with the cars of dead freight intended for set-out in the south yard, nevertheless, because of difficulties peculiar to livestock traffic, such handling would, it appears, affect adversely the line-haul carriers' operations in carrying livestock to the stockyards" (R. 72); that "there would result demands from other packers requiring defendants to render like delivery service in an amount and volume which together with such service rendered complainant would seriously interfere with, delay, and disrupt defendants' terminal operations in carrying livestock to the Union Stock Yard and in making deliveries of other freight to the industries on the Junction's lines" (R. 76); and that "the inauguration of a continuing practice of delivering livestock directly to packers" in these circumstances "would seriously interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally" (R. 77).

## I. Proceedings before the Commission and in the court below.

As has been indicated above in general terms, Swift brought this complaint before the Commission against twenty-five common carriers by rail serving Chicago (R. 50-56), presenting primarily the issue (R. 59) "whether or not [Swift] is entitled to have direct shipments of livestock delivered by the Junction without a charge in addition to the line-haul rates on a private siding at a plant which it proposes to construct in the stockyard area in Chicago."

The Union Stock Yards, and numerous parties representing commission men and buyers and sellers of livestock intervened in opposition to the complaint. The United States Department of Agriculture also intervened. (R. 198.)

Thereafter, as has also been indicated, the Junction proposed to cancel all tariffs on livestock, except to and from chutes and sidings at the Union Stock Yards. Operation of the proposed schedules was suspended on protest by Swift and Armour, who appeared as protestants (R. 254) in the I. & S. proceeding, which was heard on the same record with the complaint case.

The case was extensively heard before an examiner (R. 248-1039) and argued orally before the Commission (R. 58). The Commission filed a comprehensive report (274 I. C. C. 557; R. 57-81), concluding with the findings that "in the circumstances presented the published switching charges in addition to the line-haul rates will not be unreasonable or otherwise unlawful for the transportation of livestock for delivery on the private sidetracks to be constructed by complainant, which will connect with the Junction, provided that the tracks to be constructed will be adequate for deliveries by the Junction at its ordinary operating convenience and without interruption or interference," and that "the proposal to specifically exempt livestock from the traffic which will be transported by the Junction at Chi-

cago and to cancel the application on livestock of switching charges, except to and from cantes and sidings at the Union Stock Yards at that point, is not just and reasonable" (R. 81).

An order was accordingly entered dismissing the complaint and requiring cancellation of the suspended schedules (*ibid.*).

Commissioner Alldredge dissented (R. 81-89) on several grounds: He was of opinion that the covenant between the Stock Yards and the Junction, which had been assumed by the Junction, and which the correspondence (Ex. 57, set out *supra*, pp. 27-28) indicated (R. 82) "is recognized as still in force and effect and of some controlling importance," brought the case within the condemnation of *United States v. Baltimore & O. R. Co.*, 333 U. S. 169. "It is difficult to escape the conclusion," wrote Commissioner Alldredge, "that the pecuniary interest of the owners of the stockyards in these terminal facilities has been permitted to work itself out in such manner as to deprive Swift of a service to which it would ordinarily be entitled" (R. 83). He concluded that it was the obligation of the Junction's lessor to operate Swift's sidetrack without discrimination by reason of the command of Section 1(9) of the Act (R. 86); "that the singling out of livestock as the exclusive type of freight which will not be accorded the switching service without extra charge is not only unjust and unreasonable, under sections 1(4) and 1(5)(a)<sup>18</sup> of the act, but unduly and unreasonably prejudicial under section 3(1)" (R. 87); and that if, by reason of the service sought, an increased congestion of yard operations and facilities would result, then, in accordance with familiar principles, the additional cost should be distributed over all traffic flowing through the yards and not be charged in its entirety to a single commodity consigned to a single shipper (R. 89).

<sup>18</sup> Section 1(5)(a) was renumbered Section 1(5) by Sec. 1 of the Act of August 2, 1949, c. 379, 63 Stat. 485.

The Chicago Junction took no action to set aside the Commission's order in the I. & S. case requiring cancellation of its proposed schedules.

Swift, however, after its petition for rehearing had been denied (R. 90), brought the present action in the District Court for Northern Illinois against the United States and the Interstate Commerce Commission to set aside the Commission's order (R. 1-90). All of the carriers who had been defendants before the Commission, with the exception of the Chicago Junction, intervened as defendants (R. 97-98). The Union Stock Yards and four groups of commission men and livestock traders who had been interveners before the Commission also intervened in the action (R. 124, 131, 134-135).<sup>19</sup> The district court, three judges sitting (Duffy, Circ. J.; Sullivan and Igoe, D. JJ.), dismissed Swift's complaint (R. 210), but without writing any opinion. It made findings of fact which, after setting out the parties to the action and their interests and contentions (Fdgs. 1-8, R. 197-199); simply set forth, either in summary or by direct quotations, the facts found by the Commission (Fdgs. 9-34, R. 199-209). The latter findings, with the exception of a single proposed finding which was omitted (No. 25, R. 192), were taken verbatim from those suggested by the railroad interveners (R. 185-195). The court also made five generalized conclusions of law (R. 209), likewise taken verbatim from those suggested by the railroads (R. 195), none of which however enunciated any principles peculiar to the Interstate Commerce Act, as amended.

This appeal followed (R. 210-228).

<sup>19</sup> The Chicago Live Stock Exchange is an organization of commission men (R. 709-710). The Chicago Traders Live Stock Exchange is an organization of dealers and order buyers buying and selling livestock on their own account (R. 786-788). The National Live Stock Producers Exchange and the Chicago Producers Commission Association are cooperative associations engaged in selling and buying livestock for their own members and others (R. 803, 772-773).

## SUMMARY OF ARGUMENT

### I.

A. The Commission's finding that the high additional switching charge assessed only against livestock delivered to sidetracks is not unreasonable is without the support either of subsidiary findings or of evidence. There are no findings, and there is no evidence, as to the difference in cost between switching livestock to Swift's sidetrack, which costs \$39.24 per car more than the line-haul rate, and the cost of switching perishables or fragile goods to the same sidetrack, both of which are delivered at the flat line-haul rate. Similarly, there are neither findings nor evidence as to the difference in cost between switching livestock to Swift's sidetrack, which incurs the \$39.24 per car switching charge, and switching livestock out of consolidated trains for delivery at the Union Stock Yards; the latter operation incurs no switching charge, although it requires the carrier to bear the cost of unloading, and although it involves well over 37% of all livestock shipped by rail to the Union Stock Yards.

B. Such necessary subsidiary findings and such evidence are both lacking because the switching charge was never based on cost of service, but was fixed at its present level in order to preclude sidetrack delivery of livestock from ever being asked or rendered. The Commission, which found that even Swift's direct shipments would delay and burden the carriers if delivered to its plant sidetrack, and which found that sidetrack delivery of the direct shipments of all the packers would result in interference, delay, and disruption in terminal operations; went on to find that the maintenance of the present switching charge would not have any detrimental effect upon such operations. In other words, the Commission recognized that the high additional switching charge assessed only against livestock delivered

to sidetracks will prevent disruption because it will prevent such deliveries, *i. e.*, the Commission recognized that the charge operates as a prohibitive penalty.

C. If the Commission had determined that it was essential to efficient and expeditious terminal operations to prohibit altogether livestock shipments into the Ashland Avenue yards of the Chicago Junction, this case would be very different. But when the Chicago Junction proposed that very step, the Commission condemned the proposal as "not just and reasonable." Thus appellant is free to cause "disruption" if it will pay the price, and the Commission is itself doing indirectly precisely what it refused to permit the carrier to do directly.

D. Since the switching charge here in question is a penalty, bearing no relationship to the cost of the services rendered, it is unreasonable *per se* as a matter of law, and thus violates Section 1 (5) of the Interstate Commerce Act.

## II.

Apart from its unreasonableness, the high additional switching charge assessed only against livestock delivered to sidetracks violates numerous other provisions of the Act.

A. It violates Section 3 (1) because it is unduly and unreasonably prejudicial to livestock. A long line of cases establishes that it is unlawful for common carriers to exclude a particular commodity from the traffic which they will transport, and of course there is no difference between outright exclusion and a prohibitive penalty. Both result in an illegal disadvantaging of the particular commodity.

The circumstance that livestock requires handling different from that accorded dead freight does not justify the result reached here. Over 37% of the livestock destined to the Union Stock Yards comes out of consolidated trains and so undergoes quite as much switching as the livestock con-

signed to appellant's sidetrack, yet it is not subjected to the additional switching charge. Neither is there any switching charge on any other commodities, fragile or perishable or otherwise, consigned to the identical sidetrack. The 28-hour law, which applies to all livestock shipments by rail throughout the country, has been held not to justify a similar discrimination against livestock. Finally, the Commission has specifically ruled that the line-haul rates cover all transportation services necessary to deliver livestock at sidetracks, and that such services subject the carrier to less expense in two respects (unloading and reloading in transit, and unloading at destination) than do similar deliveries of livestock to public stockyards.

B. The high additional switching charge assessed only against livestock delivered to sidetracks violates Section 2 because it results in different rates for shipments of the same commodity, over the same line, for the same distance, under the same circumstances of carriage.

As a matter of fact, the shipment of livestock to the Union Stock Yards and to appellant's sidetrack both involve like and contemporaneous service under the same circumstances of carriage, since both shipments follow the same rail movement from point of origin to point of destination. Over 37% of the livestock consigned to the Union Stock Yards is switched quite as much as any car of livestock consigned to appellant's sidetrack. And the yardage fees exacted at the former location are for non-transportation services, as held in *Swift & Co. v. United States*, 316 U. S. 216, and so are not related to "the matter of carriage" with which Section 2 deals.

In view of the repeated rulings on the point, Section 2 applies to all deliveries within the same terminal or switching district as a matter of law. Also as a matter of law, the existence or non-existence of trackage contracts—i. e., the circumstance that the delivery of livestock to the Union Stock Yards is made by the line-haul carriers' engines un-

der trackage contracts, while the delivery of livestock to appellant's sidetrack would be made by engines of the Chicago Junction—can not justify or excuse violations of Section 2. Where the discrimination is as plain and as palpable as in this case, there is no room for "expertise" as to which carrier's engines perform the final switching operation.

C. The high additional switching charge assessed only against livestock consigned to sidetracks violates Section 1 (9) of the Act because it prevents the switch at appellant's sidetrack from being operated without discrimination. All the requirements of the statute have been complied with. The interest protected by Section 1 (9)—and ignored by the Commission—is that of expeditious *decentralized* delivery.

D. No decision of this Court sanctions the present high additional switching charge assessed only against livestock delivered to sidetracks. It was not in issue in the judicial proceedings decided by *Atchison, T. & S. F. Ry. Co. v. United States*, 295 U. S. 193; and in *Swift & Co. v. United States*, 316 U. S. 216, there were considered only direct shipments consigned by the packers to themselves at the Union Stock Yards by their own choice.

The controlling precedent here, and the one which condemns the present charge, is *United States v. Baltimore & O. R. Co.*, 333 U. S. 169; the facts in the two cases are the same in every relevant particular. The Commission, reaching a diametrically opposed result in this case because the removal of the present obvious discrimination is thought to result in disruption, is espousing the dogma of Railroad Statics. But for the rulings under review, there is no support for any such reasoning to justify the continuance of a discriminatory charge.

## III.

The decisions of this Court, in an unbroken line, condemn the Commission's justification of discrimination on the stated grounds of congestion, inconvenience, and long-continued practice.

A. The burden of congestion must be borne equitably by all users of congested facilities, and may not be assessed in its entirety, as is done in this case, against a single commodity consigned to a single shipper. The rulings on this point since the time of the Commission's creation simply restate the common law standard that a carrier must accord equal treatment to all patrons.

B. *A fortiori*, a carrier has no right to deny service now on the ground that in the future its capacities may be overtaxed. Until "his coach be full", the carrier may not refuse service. On the whole record in this case, there is no substantial evidence to support the Commission's finding that, if this appellant obtained the relief sought, the other packers would request similar service. The examiner found to the contrary; there was not a word of evidence from any packer's official on the point; and the Commission's rationalizations as to competitive compulsion ignore completely the circumstance that no other Chicago packer has ever acquired what Swift has had for over 35 years, a sidetrack directly off the rails of a line-haul carrier.

C. Nor is there, on the whole record, substantial evidence to support the Commission's finding that the sidetrack delivery of Swift's direct shipments standing alone would considerably delay and burden the railroads' operations. Such shipments are less than 2% of all the traffic now flowing through the Chicago Junction's Ashland Avenue yards, and could moreover have been absorbed several times over in recent years by the decline in rail shipments of livestock to the Union Stock Yards during that period. Furthermore, all of the evidence as to congestion and disruption

was predicated on the assumption of sidetrack delivery of all of the packers' direct shipments, and not a single operating witness testified to what he believed would happen if only this appellant's shipments were so delivered.

But appellant's argument does not rest on the infirmities of the two findings just examined. Even if those findings are taken at face value, even if Swift's shipments alone will produce congestion, even if all the other packers follow Swift in demanding similar service, even if the combined influx of all the direct shipments produces more congestion, still those facts can not and do not excuse discrimination. The removal of discrimination is and has been the primary purpose of the Interstate Commerce Act. That aim, under the decisions, can not be frustrated either by inadequacy of facilities, or by practical difficulties, or by conflicting interests of owners of track, or by equivalent discrimination caused other groups, or by long-continued practice. The categorical command of the Act may not be so watered down.

#### IV.

A. The volume of rail receipts of livestock at the Union Stock Yards has decreased in the last 25 years by more than 80%, or some quarter of a million carloads annually. The record does not show the extent of the increase of other traffic on the rails of the Chicago Junction, but it does show five other factors, attributable to appellees' acts and not to the volume of traffic, which contribute materially to the congestion which is relied upon to justify the discrimination here complained of.

(i) The motive power of the Chicago Junction has decreased by some 45% since its lease by the New York Central, and is stated by the Junction's operating personnel to be inadequate.

(ii) A labor agreement signed by the Chicago Junction requires 3800 more train crews, each composed of 5 men, in

order to move the same volume of traffic theretofore carried, and moreover forces more cars into the Ashland Avenue yards.

(iii) The rules of the Union Stock Yards forbid the line-haul carriers from pulling into its chutes any car loaded with dead freight, a factor which is shown to add to those carriers' difficulties in delivering consolidated trains containing both livestock and dead freight.

(iv) The Chicago Junction has granted the line-haul carriers trackage rights to deliver livestock to the Union Stock Yards, but refuses them trackage rights to deliver livestock at Swift's sidetrack.

(v) The line-haul carriers' crews may and do operate over the Chicago Junction's rails without regulation and without any limitation as to time or hours.

B. The Commission failed to alleviate the existing congestion although it was amply empowered to do so.

(i) Sections 1 (10) and 1 (11) of the Act empower the Commission to require the Chicago Junction to provide sufficient suitable switching locomotives to effect all necessary switching. Moreover, since the Junction is under lease by the New York Central, Section 1 (3) (a) of the Act makes it a part of the Central as a matter of law; and indeed the Commission approved that lease in 1922 because, *inter alia*, it would insure to the Junction's shippers the assistance of an interested trunk line in times of car shortage.

(ii) The Junction can not rely on a labor agreement to justify a violation of the Interstate Commerce Act, any more than an employer can rely on a labor agreement to justify a violation of the Sherman Antitrust Act. *Allen Bradley Co. v. Union*, 325 U. S. 797.

(iii) The obstructive rules of the Union Stock Yards are condemned by the decisions which hold that the owner of a piece of track may not require the using carrier to refuse

to transport a particular class of merchandise over it. *E.g., United States v. Baltimore & O. R. Co.*, 333 U. S. 169.

(iv) The Commission's power to correct discrimination, in the face of a contention that the carrier concerned lacked the necessary trackage rights, has been unquestioned since *United States v. Pennsylvania R. Co.*, 266 U. S. 191.

(v) There are ample precedents for the Commission's power—and duty—to correct the anarchic conditions obtaining on the tracks of the Chicago Junction. The circumstance that the Commission not only takes no corrective action, but in fact specifically puts forward those conditions as a reason for continuing the present discrimination, shows the extent to which it carries its devotion to the philosophy of Railroad Statics.

## V.

The heart of this case is the covenant whereby the New York Central agrees to operate the Chicago Junction for "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards.

A. That covenant is an undertaking to favor a particular patron, consequently it is a covenant to discriminate, and therefore it is illegal on its face. *United States v. Baltimore & O. R. Co.*, 333 U. S. 169. It is not saved by the clause, "in so far as possible", even if that clause be construed as "in so far as *legally* possible". Since there are no legal discriminations under the Act, such a construction would render it nugatory; and the record shows that the parties to the covenant did not treat it as meaningless.

B. The covenant was invoked under threat of cancelling the Central's lease of the Junction. Thereafter, the Central proceeded to defend appellant's complaint before the Commission, which it would not otherwise have done, and thereafter, also, the Junction proposed to cancel all switching

tariffs on all livestock not consigned to the chutes of the Union Stock Yards. Thus; far, from being divested of control over the Junction, as the Commission asserted, the Union Stock Yards is shown on this record to be still exercising a substantial element of control over the Junction's operations.

C. More than that, the covenant continues and perpetuates the existing congestion. The Central is under no incentive to improve operating practices, because, to the extent that it does so and facilitates sidetrack delivery of livestock, that circumstance disadvantages the business and affairs of the Union Stock Yards—in violation of the covenant. In the light of the operating practices disclosed by the record, the covenant appears as what it is, not simply an abstract generalization, but as the unifying factor of an effective combination in restraint of trade.

D. Despite its protestations to the contrary, the Commission's ruling, in fact, enforces the illegal covenant between the New York Central and the Union Stock Yards to the detriment of the present appellant. For, under the decision below, the Chicago Junction is, with the sanction of the Commission, managed and operated so as to assure a direct and uninterrupted movement of livestock to and from the Union Stock Yards under trackage contracts, with consequent benefit and advantage to the business and affairs of the Yards by reason of the yardage fees assessed on livestock so delivered, while at the same time the Junction is permitted to exact a high additional switching charge for the transportation of livestock to any consignee on its rails not using the services of the Yards. No other conclusion is fairly possible when the five obstructive factors discussed under Point IV are viewed in their setting. However much the Commission may have minimized the covenant, its ruling in fact enforces it; perpetuates the congestion, and consequently perpetuates the discriminatory switching charge which that congestion was held to justify.

E. The circumstance that the present system of delivering livestock at Chicago has long been in effect does not insulate it against change when, as here, it is shown to violate the Interstate Commerce Act. Neither contract nor long-continued custom can justify a practice that the statute was designed to suppress. Nor do difficulties involved in the correction of a long-standing discrimination operate as a valid reason against corrective action. The doctrine of Railroad Statives must yield to the primary Congressional purpose of removing inequalities and preferences; discrimination does not attain legitimacy through prescription.

The circumstance that this appellant was once financially interested in the Union Stock Yards and so contributed to the existence of the present physical arrangement is of no moment now, after Swift has been divested of those interests by an antitrust decree. The interests of the Union Stock Yards and of this appellant are now divergent. In any event, there is no estoppel against the assertion of rights under the Interstate Commerce Act; and, preeminently, the removal of a restraint on interstate commerce can not justify the continuance of a discrimination in interstate commerce.

## ARGUMENT

The questions involved in this appeal concern primarily the Interstate Commerce Commission's errors in the application of rules of law, and the Commission's inability to perceive the effect of a discriminatory covenant whose existence and terms are unquestioned. Only secondarily, despite the apparent complexity of the record under review, does this appeal involve controverted questions of fact, and even in that realm there is no dispute as to any present, existing fact; the differences between the parties turn on predictions of the possible future effects of action yet to be taken.

Appellant's case rests on the asserted illegality of the high additional switching charge, amounting to \$39.24 per car, which is exacted in respect of livestock delivered to its own siding over a switch connection which is now and has long been in active operation. That charge is not imposed on any other commodities delivered to the same siding, nor on livestock delivered to the Union Stock Yards, a few city blocks away.

We contend, first, that this high additional switching charge, which is assessed only against livestock delivered to sidetracks, is unreasonable in and of itself, in violation of Section 1 (5) of the Interstate Commerce Act, because it was imposed and understood to operate as a penalty, to prevent sidetrack delivery of livestock—although the Commission expressly declined to permit the carrier concerned to refuse sidetrack delivery of livestock altogether. Point I, *infra*, pp. 59-62.

We contend, next, that the high additional switching charge assessed only against livestock delivered to sidetracks is discriminatory and prejudicial, in violation of numerous provisions of the Interstate Commerce Act (Point II, *infra*, pp. 63-89), and that the congestion which is the Commission's sole reliance for approval of the discriminatory charge can not as a matter of law justify such palpable violations of the Act. Point III, *infra*, pp. 90-104.

We go on to analyze the operation of the Chicago Junction Railway (the carrier on whose tracks both appellant's sidetrack and the Union Stock Yards are located), show that the congestion relied upon to justify discrimination is in fact the result of the appellees' own acts rather than of the volume of livestock traffic involved, and point out how the Commission has failed to relieve the congestion although possessed of ample and effective powers to do so. Point IV, *infra*, pp. 105-116.

Finally, we draw attention to the undisputed evidence which shows that the covenant whereby the New York Central agrees to operate the Chicago Junction for "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards is still in full force and effect. We show how this covenant operates to discourage improved operating conditions or reduced congestion, since any step facilitating sidetrack delivery of livestock would disadvantage the business of the Union Stock Yards, in violation of the covenant; that it is this covenant which is the focal point of the discrimination that inflicts the high additional switching charge, here under attack, which is assessed only against livestock delivered to sidetracks; and, finally, that the Commission's ruling, which sanctions that charge, is in consequence enforcing the covenant—which, being discriminatory, is obviously illegal. Point V, *infra*, pp. 117-141.

We proceed now to the step-by-step development of the foregoing contentions.

**I. THE COMMISSION'S REPORT SHOWS ON ITS FACE THAT THE HIGH ADDITIONAL SWITCHING CHARGE, ASSESSED ONLY AGAINST LIVESTOCK DELIVERED TO SIDETRACKS, BEARS NO RELATIONSHIP WHATEVER TO THE COST OF THE SWITCHING SERVICE RENDERED; THAT THIS CHARGE WAS INTENDED AND UNDERSTOOD TO OPERATE AS A PENALTY; AND THAT BY UPHOLDING IT THE COMMISSION WAS COVERTLY SANCTIONING PRECISELY THE SAME PROHIBITION AGAINST SIDETRACK DELIVERY OF LIVESTOCK WHICH, WHEN PROPOSED TO BE DONE DIRECTLY, THE COMMISSION IN THE SAME REPORT HELD TO BE "NOT JUST AND REASONABLE."**

We direct attention at the outset to the switching charge itself, now amounting to \$39.24 per car of livestock, which has been sustained as reasonable by the Commission. Quite apart from all its other infirmities, which are discussed at length below, we contend that ~~this is~~ *not a bona fide* charge for services rendered; that it was and is known to be a penalty, designed to prohibit indirectly what the Commission refused to permit the Chicago Junction to prohibit directly; and that it was upheld on grounds which patently reflect those conclusions.

**A. The Commission's findings are inadequate to support the high additional switching charge assessed only against livestock delivered to sidetracks, and the evidence shows clearly that this charge bears no relationship whatever to the cost of the switching service rendered in such deliveries.**

The sole finding of the Commission as to the quantum of the switching charge was (R. 80):

The evidence affords no basis for a conclusion that the terminal charge of the Junction in addition to the

line-haul rates is unreasonable for deliveries of livestock to the proposed plant, considering services and modification of services that would be required for the desired deliveries and the effect upon terminal operations generally of performing such delivery service to the proposed plant.

There are no findings whatever as to the cost of the "services and modification of services that would be required." Accordingly, it follows, without more, that the Commission's ultimate finding lacks the support of those basic subsidiary findings which are requisite to its validity. *Florida v. United States*, 282 U. S. 194; *United States v. Baltimore & O. R. Co.*, 293 U. S. 454; *United States v. Chicago, M. St. P. & Pac. R. Co.*, 294 U. S. 499; *Interstate Commerce Commission v. Mechling*, 330 U. S. 567; *New York Cent. R. Co. v. United States*, 99 F. Supp. 394 (D. Mass.), affirmed, 342 U. S. 890; *Tennessee Valley Authority v. United States*, 96 F. Supp. 409 (N. D. Ala.); *Palmer v. United States*, 75 F. Supp. 63 (D. D. C.).

This is not a matter of the *elegantia juris*, cf. *Yonkers v. United States*, 320 U. S. 685, 695; *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86-87, this is an insistence that there be basic findings of subsidiary facts to lend rational support to the ultimate conclusion. For without such findings of subsidiary facts, the administrative agency's ultimate conclusion is not shown to have been rationally arrived at; it may have been—and frequently is—simply the recording of a predetermined administrative fiat; and assuredly it lacks the foundation of reason—without which agency action is merely arbitrary.

The books are full of instances where extra charges imposed by the Interstate Commerce Commission have been set aside on review because unsupported by subsidiary findings which would demonstrate the reasonableness of the imposition in question. Thus, in the *Mechling* case, this Court said (330 U. S. 581, 583)—

\* \* \* the extra service must fit the extra charge \* \* \*

To justify increasing the reshipping rates of ex-barge grain the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-barge grain than of re-shipping ex-lake or ex-rail grain moving from the same localities and requiring the same service as does the ex-barge grain.

So, in the recent case involving grain rates to Baltimore (*New York Cent. R. Co. v. United States*, 99 F. Supp. 394 (D. Mass.), affirmed, 342 U. S. 890, where the Commission's order was set aside for, *inter alia*, lack of sufficient findings, Judge Magruder said (99 F. Supp. at 401):

\* \* \* the Commission does not fulfill its duty, in a case such as the present one, if it does no more than state as its ultimate conclusion that "the proposed schedules have not been shown to be just and reasonable".

\* \* \* As stated in *United States v. Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 533, an ultimate finding is not enough in the absence of a basic finding to support it. \* \* \* And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion.

Similarly, in *Palmer v. United States*, 75 F. Supp. 63 (D. D. C.), where the district court set aside an order of the Commission increasing the per diem charge for foreign freight cars, one of the bases for such action was the lack of essential findings. On this point Judge Prettyman said (75 F. Supp. at 76):

The contention of Commission counsel, and of counsel for the intervening-defendant railroads, that the order involved can be sustained as an order fixing compensation in the wholly remunerative sense, is quickly disposed of. \* \* \* There are no findings of fact upon which the order could rest, if upon that theory. Such findings are wholly missing. The court could not possibly tell from the findings whether the order, if it pur-

ported to fix only remuneration for car ownership, was fair and reasonable, or was unfair, unreasonable, and arbitrary. No findings of underlying facts which might be used as standards for that determination are in the report. We think it clear that the Commission neither intended to, nor did, rest its order upon that theory, and we doubt its ability to do so.

The Commission did not in the foregoing case appeal from the judgment setting aside its order.

And, in another case where an Interstate Commerce Commission order was set aside for want of basic findings (*Tennessee Valley Authority v. United States*, 96 F. Supp. 409 (N. D. Ala.)), the court specifically pointed out, *id.* at 415, that—

No effort was made to sift the understatements and overstatements and to translate them, clearly and unambiguously, into terms of actual difference in cost involved in switching ex-barge and ex-rail freight.

In that instance, likewise, the Commission did not appeal the adverse ruling of the district court.

On the basis of the foregoing authorities, it would be necessary, in order to justify the switching charge in the present case as to amount (*i. e.*, its reasonableness under Section 1(5) of the Act), for the Commission to make findings as to the difference in cost between switching livestock to Swift's sidetrack, which involves such a charge, and the cost of switching perishables or fragile goods to the same sidetrack, both of which are delivered at the flat line-haul rates. The Commission would also be required to make findings as to the difference in cost between switching livestock to Swift's sidetrack, and switching livestock out of consolidated trains to the Union Stock Yards; the latter operation involves no switching charge, requires the carrier to bear the cost of unloading, and covers well over 37%, see pp. 20-21 *supra*, of all livestock shipped by rail to the Union Stock Yards.

Without findings of this nature, there is no support for the Commission's conclusion that the high additional switching charge assessed only against livestock delivered to sidetracks is not shown to be unreasonable. That conclusion stands simply as an arbitrary *ipse dixit*. And appellant's argument under this heading ~~can~~ not fairly be characterized as insistence on empty formalism, *cf. Yonkers v. United States*, 320 U. S. 685, 698, for the compelling reason that it is impossible for anyone on this record to make the necessary subsidiary findings which are absent from the Commission's report. The evidence shows that the real reason for the Commission's failure to find subsidiary and basic facts is that such facts are simply non-existent.

There is evidence in the record that the handling of livestock is similar to the handling of perishables generally (R. 619, 706-707). And eggs, notably, like livestock, require special care in handling. The Commission's reports demonstrate that at some points the damage claims in respect of egg shipments aggregate on occasion almost 60% of the revenue derived from their carriage. See *New York Mercantile Exchange v. Baltimore & O. R. R. Co.*, 36 I. C. C. 156, 158-159. A proceeding now pending before the Commission shows that during the year 1947 claim payments at four terminal cities for eggs damaged in transit came to 41.7% of the total freight charges for that commodity, and at New York were 50.5% of the total freight charges.<sup>1</sup> But the delivery of eggs and other perishables to Swift's sidetrack involves no switching charge (Ex. 10 at R. 1058-1060), and yet such delivery is effected in precisely the same manner as the physical delivery of livestock to the same sidetrack, which costs \$39.24 a car extra.

<sup>1</sup> See sheets 9-10 of the Examiners' Report in *Special Regulations—Eggs*, I. C. C. Docket No. 30030, and *Damage Tolerance on Shell Eggs*, I. C. C. I. & S. Docket No. 5792, argued before the Commission on October 26, 1951. These findings were not excepted to by any of the parties, and the issue in the consolidated proceeding is whether the carriers' proposed percentage limitation of liability rule is lawful in the face of Section 20(11) and other sections of the Interstate Commerce Act.

Similarly, it can not be disputed that when livestock arrives at the Union Stock Yards in consolidated trains, and over 37% does so arrive, considerable switching is necessary within the Chicago Switching District before such delivery can be effected, *supra*, pp. 17-19. And there is no evidence in this record even remotely suggesting that the livestock so shipped in consolidated trains is any less fragile or any more sturdily fashioned than the livestock which Swift seeks to receive at its own sidetrack, similarly free of a switching charge.

There is not a syllable of evidence in this record supplying proof of the expense of switching a car of livestock to Swift's sidetrack, as compared with the expense incident to switching a carload of eggs there. Similarly, there is not a shred of testimony among all the voluminous data presented to the Commission showing the expense of switching a car of livestock to the Union Stock Yards out of a consolidated train sent to the Ashland Avenue yards of the Chicago Junction, by comparison with the cost of switching the car a few blocks in the other direction, to Swift's sidetrack.<sup>2</sup>

<sup>2</sup> The "cost studies" included in Exhs. 50-52 (R. 1856-1867) do not consider or show line-haul rates; they set up no comparative costs of switching services; and they only purport to show switching costs within the Chicago Switching District for the two carriers having by far the longest haul from their break-up yards to the stock yards area (R. 952-971, 976-982). (The distance from the Milwaukee's Bensenville Yard to the Union Stock Yards is 27 miles, from the Proviso Yards of the Chicago & North Western it is 18 miles (R. 69).) The engine hour costs are divided into the number of cars in the switching movement to get the cost per-car. This, obviously, shows (a) nothing as to the difference in the costs of switching a car of eggs to Swift's sidetrack as compared with the cost of switching a car of livestock to the same sidetrack, and (b) nothing as to the difference in cost of switching a car of livestock to the Union Stock Yards as compared with switching a car of livestock to Swift's sidetrack.

It was said in the Commission's Motion to Affirm (p. 10) that "the record reveals (Exhibit 50-52) that the carriers receive no revenue on the basis of the line-haul rates that would allow them to pay the switching charge." This comment misapprehends both the contents of the cited exhibits and the direction of appellant's argument, which on this point is based on Assignment of Error 31, R. 216.

The short of the matter is that the Commission's negative conclusion as to the lack of showing of unreasonableness of the high additional switching charge of \$39.24 per car, assessed only against livestock delivered to sidetracks, is not only unsupported by any subsidiary findings on which that ultimate conclusion can be rested, it is likewise unsupported by any evidence in this record, or—we submit with assurance—by any evidence which could be adduced in any other proceeding.

Of course we do not for a moment concede that any additional switching charge assessed only against livestock delivered to sidetracks, however reasonable in and of itself, however well supported by evidence and subsidiary findings, could possibly be lawful. Even a reasonable charge so limited would be unjustly discriminatory and unduly prejudicial in violation of numerous provisions of the Interstate Commerce Act, as we go on to show under Point II, *infra*, pp. 63-89. But we think it is highly significant that no appellee up to now has undertaken to defend the reasonableness *per se* of the high additional switching charge now in question, either by pointing out the existence of the criteria which would establish such reasonableness, or by reasoned argument in support of that charge's present level. This pointed omission serves both to introduce—and to underscore—our next contention, *viz.*, that the present switching charge was and is designed as a penalty, rather than as an honest fee measured by the cost of services to be rendered.

**B. The high additional switching charge assessed only against livestock delivered to sidetracks was intended as, and understood to be, a prohibitive penalty.**

The reason why the Commission's finding as to the reasonableness of the amount of the high additional switching charge assessed only against livestock delivered to sidetracks is unsupported either by subsidiary findings or by evidence as to the cost of the switching service involved

in such delivery is not hard to find: That amount, ~~now~~ \$39.24 per car, was not and is not based on cost of service, but was and is placed thus high in order that this kind of service would never be demanded. It was intended to be and is a prohibitive penalty, to preclude such service ever being asked or rendered. And the Commission's report shows on its face that the Commission itself fully understood and appreciated—and approved—this aspect of the switching charge.

As we have shown, the Commission found that the delivery to Swift of "even 18 cars of livestock daily"—the average of Swift's direct shipments—"would considerably delay and burden defendants' operations" (R. 74-75). Moreover, the Commission placed great stress on the circumstance that plant delivery of livestock to packers generally "would seriously interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally." See pp. 33-34, *supra*. To the extent that the Statement herein and the Commission's report fail to convey the full details of the disruption thought by certain of the witnesses to result from compliance with the anti-discrimination provisions of the Interstate Commerce Act, the intervening appellees' briefs will doubtless, as they did in the court below, supply any lurid touches that may have been overlooked. The significant point for present consideration is that the Commission, which found that the claimed disruption would occur, made no move to preclude its occurrence. Instead, it found (R. 80-81):

The published switching charge is appropriate for any switching that may occur of cars of livestock to complainant's proposed plant. *It does not appear that the maintenance of a switching charge for livestock will have any detrimental effect upon terminal operations.*

We have ourselves italicized the last sentence, because it proves our point: Maintenance of a high additional switching charge assessed only against livestock consigned to sidetracks will prevent disruption because it will keep live-

stock from being shipped to sidetracks. Plainly, therefore, the switching charge operates as a prohibitive penalty, and the Commission knew it and so stated. The truth of our contention that the present switching charge of \$39.24 per car of livestock is not an honest charge, measured by the cost of services rendered, is thus established by the Commission's report itself.

**C. By upholding the switching charge on livestock, the Commission was covertly sanctioning precisely the same prohibition against shipment of livestock which, when frankly proposed by the railroad, the Commission in the companion case held to be "not just and reasonable".**

We recognize, of course, that terminal operations may well be regarded as a subject peculiarly within the competence of a body "appointed by law", "informed by experience", and dedicated to the public interest in the removal of unlawful discriminations. Consequently, if the Commission had, in furtherance of the National Transportation Policy, *infra*, p. 142, "to promote safe, adequate, economical, and efficient service," determined that it was essential to "efficient and expeditious terminal operations generally" (R. 71) to prohibit altogether livestock shipments into a particular area, we should have a very different case. A court might well hesitate before setting aside such an order. But no such order is involved here.

o To the contrary, when the Chicago Junction Railway proposed to take the precise step which would avoid the disruption which was testified to and which the Commission found would result in interference, delay, and disruption in terminal transportation operations, the Commission denied the Junction permission to do so.

The Junction proposed (R. 59) "to specifically exempt livestock from the traffic which it will transport and to cancel the application on livestock of all switching charges published by it, except to and from chutes and sidings at the Union Stock Yards." In other words, the Junction

undertook to prohibit entirely the precise kind of traffic which on the Commission's reasoning would result in disruption, and to restrict itself to its existing method of delivering livestock, *viz.*, to the chutes of the Union Stock Yards. Did the Commission seize upon this opportunity to prevent the possibility of destructive disruption? It did not. It said (R. 77) that "The proposed complete exemption of livestock from transportation by the Junction under any circumstances is not justified." It pointed out (R. 80) that "The Junction provides for switching charges on 'all carload freight.' That provision, without qualification, includes livestock. There is therefore a holding out by the Junction to switch livestock to and from industries, sidings, team tracks, and districts listed in the tariff." And, accordingly, the Commission found (R. 81),

that the proposal to specifically exempt livestock from the traffic which will be transported by the Junction at Chicago and to cancel the application on livestock of switching charges, except to and from chutes and sidings at the Union Stock Yards at that point, is not just and reasonable.

The result of the foregoing is that the Commission in this case is enforcing a penalty—"It does not appear that the maintenance of a switching charge for livestock will have any detrimental effect upon terminal operations"—in a situation where it has specifically ruled that an unequivocal prohibition is "not just and reasonable."

It follows that, if Swift cares to spend \$254,628.36 annually—6489 cars a year at \$39.24 per car—it is entirely free "seriously [to] interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally" (R. 77)—and, under the order of the Commission and the ruling of the court below, such a course would be perfectly lawful. That conclusion, obviously, makes neither good sense or good law. If what Swift sought was against the public interest, it should not be permitted at any price.

The Commission's report does not, doubtless because it can not, face this inherent infirmity in the orders made. The court below, ignoring repeated admonitions of this Court,<sup>3</sup> wrote no opinion to explain or justify the result, an omission which is the more disturbing where, as here, the case comes to this Court on direct appeal as of right, without any further sifting or clarification of the issues involved. The intervening appellees ignored the inconsistency in their motion to affirm. And the position of the Commission's legal representatives, as disclosed in this Court, is even more tongue-in-cheek than the Commission's original report.<sup>4</sup>

**D. Being a penalty and not a compensatory exaction, the high additional switching charge assessed only against livestock delivered to sidetracks is unreasonable per se and therefore illegal.**

The present case will not be the first instance where the courts have prevented the Interstate Commerce Commission from doing indirectly what it could not lawfully do directly.

In *Interstate Commerce Commission v. Mechling*, 330 U. S. 567, one of the grounds on which the setting aside of the Commission's order was affirmed was that the regulatory agency had attempted to produce indirectly a result which Congress had forbidden to be done directly. In the language of this Court (330 U. S. at 577-578)—

Recognizing that it could not require these barge-carriers to raise these inbound rates which it accepted as reasonable, the Commission has here approved an order which would bring about the same prohibited

<sup>3</sup> *Cleveland, etc., Ry. v. United States*, 275 U. S. 404, 414; *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86-87, and cases there cited.

<sup>4</sup> "The Commission will not, and should not be required to resort to legalistic thinking as a substitute for the application of reason to practical problems. While the charge was entirely reasonable for the service the Commission knew that it would be availed of when Swift had special need to have livestock moved in that way." I. C. C. Motion to Affirm, p. 19.

result by raising the railroad rates charged by eastern roads for ex-barge grain shipments east from Chicago. Congress has forbidden this.

In *Palmer v. United States*, 75 F. Supp. 63 (D. D. C.), already cited in another connection, where the court had under consideration the Commission's order in *Increased Per Diem Charge on Freight Cars*, 268 I. C. C. 659, the issue was whether, wholly apart from fixing reasonable remuneration for car ownership—i. e., the charge that the using carrier must pay the owning carrier for the use of the latter's cars—the Commission had power to increase the established per diem charge so as to make that charge an instrument of regulation to control the prompt movement and return of foreign freight cars. The district court, *per Prettyman*, Circ. J., held that the Commission had no such power, saying *inter alia* (75 F. Supp. at 67, 68, 75):

While the determination of proper compensation is a phase of the regulation of use, it is a specific power with definite characteristics and limitations. It is not an elastic concept adaptable in amount for use for other regulatory purposes. . . .

The penalty or incentive characteristic of the per diem is merely an inherent quality of a charge based upon time. Reference to that quality is not equivalent to saying that a rental can, by a prohibitive amount, be made an instrument of compulsion. An inherent quality of its reasonable amount is one thing, but an indefinite expansibility of its amount for regulatory purposes is quite another.

In the second place, in its ordinary and generally-accepted meaning, "reasonable compensation" does not include amounts in addition to actual remuneration. The term is a widely-used and familiar expression, not unlike expressions such as reasonable salaries, reasonable rents, reasonable prices. We know of no departure from the concept that they are based on an equivalence with the thing or service given. "Reasonable compen-

sation for use" does not convey a prohibitory or regulatory idea.

We hold that the statutory authority to fix reasonable compensation for the use of cars does not empower the Commission to establish, solely for general car-service regulatory purposes, rentals in excess of any purported reasonable recompense to the owner.

The Commission did not appeal the adverse judgment in the case cited; which is to say, it confessed correctness.

The considerations outlined in the *Mechling* and *Palmer* cases are fully applicable here. The Commission lacks the power to approve an admittedly unreasonable charge, since to do so would violate Section 1(5). Here it is not necessary to argue the rate level, since the Commission's own report (R. 80-81) frankly admits that the high additional switching charge assessed only against livestock delivered to sidetracks is a penalty. Hence that charge is unreasonable *per se*, and illegal. Indeed, the present case is more flagrant than those just discussed, for here the Commission itself has, in the same report, specifically declined to sanction directly the precise step of preventing all sidetrack delivery of livestock which, with the same breath, it is now sanctioning indirectly through the approval of an excessively high switching charge. We doubt if the files of this Court, or, indeed, the history of American administrative law, will disclose a similar admission on the part of any regulatory agency of the kind of covert regulation undertaken in this case and now sought to be defended.

## II. THE HIGH ADDITIONAL SWITCHING CHARGE ASSESSED ONLY AGAINST LIVESTOCK DELIVERED TO SIDETRACKS VIOLATES NUMEROUS PROVISIONS OF THE INTERSTATE COMMERCE ACT.

Our next point is that the switching charge of \$39.24 per car, which is assessed only against livestock delivered to sidetracks, in addition to being unreasonable—or, *arguendo*, even assuming it to be reasonable standing alone<sup>5</sup>—is discriminatory and prejudicial in violation of numerous sections of the Act.

### A. The switching charge violates Section 3(1) of the Act because it is unduly and unreasonably prejudicial to livestock.

The present switching charge violates Section 3(1) of the Act (*infra*, p. 145); because it subjects livestock consigned to Swift's sidetrack to an undue prejudice as compared with other species of traffic consigned to the same point, in violation of the provision that carriers shall not subject "any particular description of traffic" to such a disadvantage. Livestock consigned to Swift's sidetrack from any point must pay a switching charge of \$39.24 a car in addition to the line-haul rate, while all other freight consigned to the identically same track, including eggs and perishables, pays only the line-haul rate, without more, regardless of what switching may have been involved within the Chicago Switching District.

<sup>5</sup> It was early recognized that "a charge may be perfectly reasonable under section 1 [now Section 1(5)], and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3." *Interstate Commerce Comm. v. Baltimore & O. R. Co.*, 145 U. S. 263, 277.

Accord: "Both rates may be within the zone of reasonableness and yet involve unjust discrimination." *American Express Co. v. Caldwell*, 244 U. S. 617, 624. "Both rates may lie within the zone of reasonableness and yet result in undue prejudice." *United States v. Illinois C. R. Co.*, 263 U. S. 515, 524.

As we have shown, the switching charge on livestock so consigned is not based on the need for expeditious handling, for perishables are not subject thereto, nor is it based on fragility, as eggs likewise are delivered free from any switching charge. We have also shown that the switching charge was intended to prevent, and was found by the Commission to be effective for the purpose of preventing the shipment of livestock to Swift's sidetrack.

The result is a clear violation of Section 3(1), as it has long been settled that railroads can not lawfully single out and exclude a particular commodity from the traffic transported by them as common carriers over their lines to a particular destination. *Louisville & Nashville R. Co. v. United States*, 238 U. S. 1; *Louisville & Nashville R. Co. v. United States*, 242 U. S. 60, 74; *United States v. Baltimore & O. R. Co.*, 333 U. S. 169; *Interstate Stock-Yards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472, 493 (C. C. D. Ind.). As this Court said in the case first cited (238 U. S. at 19):

Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the Yard is a facility open for the switching of cotton and wheat and lumber but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso of § 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others.

Obviously there is no difference in substance between an absolute refusal to deliver livestock at the line-haul rate,

such as was involved and condemned in *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, and a refusal to deliver livestock except upon payment of a prohibitive—and admittedly effective—penalty, which is the situation here. In either event, livestock is being subjected to an illegal disadvantage.

The only portions of the Commission's report which even bear on Swift's contention that livestock as a commodity was being subjected to undue prejudice and disadvantage are those which suggest (R. 65) that "The measure of the transportation services rendered shipments of live animals is substantially greater than that accorded dead freight," those stressing the delicate nature of livestock (R. 73), and those dealing with the carriers' obligations under the Federal 28-hour law (45 U. S. C. 71-74, *infra*; pp. 147-149) (R. 64).

There are several answers to these suggestions.

First. 37% of the trains carrying livestock to the Union Stock Yards—which means substantially more than 37% of the livestock so carried, see pp. 20-21, *supra*—are consolidated trains, carrying livestock and dead freight, with the result that switching and "set outs" are necessary to get that livestock to the unloading chutes (R. 62-63). Yet neither the Union Stock Yards nor its consignees are subjected to the \$39.24 per car switching charge in respect of the livestock so switched.

Moreover, considerable switching of livestock takes place long before any livestock reaches the Chicago Junction's tracks. For, although the Commission significantly failed to advert thereto, it is the fact that even the trains for the Union Stock Yards which consist of livestock exclusively are made up at the several line-haul carriers' break-up yards from mixed trains arriving at Chicago (R. 609, 634-635, 649-650, 675-676, 692). In many instances, too, considerable switching takes place before arrival in the Chicago Switching District (R. 634-635, 649, 675-676). But, while the Commission's report expounds at some length the

delicate nature of livestock and the need for special handling in connection therewith (R. 73), that report nowhere undertakes to explain why or in what respect the livestock proposed to be switched to Swift's sidetrack is so much more fragile than those remarkably sturdy animals which the carriers switch out of consolidated trains, sometimes twice within the Chicago Switching District, for delivery at the Union Stock Yards or to the carriers' team tracks in Chicago (Ex. 17, R. 1101-1102), that the former involves an additional charge of \$39.24 for each car so switched, while the latter costs nothing beyond the line-haul rate. Nor does the record reflect any data as to the relative stamina of the two groups of livestock, although the Commission has ruled that the livestock destined to Swift's sidetrack must pay the switching fee, while the livestock consigned to the Union Stock Yards or to the carriers' team tracks, does not.

Second. It is also the fact that other fragile and perishable commodities, notably eggs and live poultry, also require a substantially greater measure of transportation services than that accorded other dead freight. See p. 54, *supra*, for the statistics relative to the staggering extent of claims for damages to egg shipments. But such other commodities are not subjected to any switching charge when delivered to the same Swift sidetrack (Ex. 10 at R. 1058-1060).

Third. With respect to the 28-hour law, that law—or its predecessor—has been specifically held not to justify a Section 3(1) discrimination against livestock. See *Interstate Stock-Yards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472, 483, *supra*. Moreover, every delivery of livestock throughout the land is subject to the 28-hour law, whether the animals being carried are consigned to the Union Stock Yards, to Swift's sidetrack at the Omaha plant in Chicago, to the several carriers' team tracks in Chicago (Ex. 17, R. 1101-1102), or to the sidetracks at the many packing plants throughout the entire country which are listed in Exhibits 10 and 12 (R. 1063-1069, 1083-1090).

Fourth. There is a longer<sup>9</sup> technical answer which is equally conclusive.

In *Omaha Live Stock Exc. v. Chicago & N. W. Ry. Co.*, 178 I. C. C. 1, 14, and again in *Chicago Live Stock Exc. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 542, the Commission specifically declared that the basic livestock rates which it prescribed and which are now in effect (plus general increases subsequently authorized) were placed by it on a level adequate to compensate for the receipt, line-haul transportation, and delivery of livestock to all points. The Commission on these occasions said (178 I. C. C. at 14):

Those rates have been designed, not only to afford uniformity and equality as between shippers and as between markets, but they have also been designed to cover, not only line-haul service, but also terminal service involving both receipt of shipments at points of origin and their delivery at destination.

And again (219 I. C. C. at 542)—

\* \* \* the through rates prescribed in the latter proceeding [*Livestock—Western District Rates*, 176 I. C. C. 1] were designed to cover the cost of normal terminal services, including unloading charges.

Next, carriers need not pay for the service of unloading livestock delivered to a private sidetrack, while they are required to absorb such charges, out of the line-haul rate, in respect of livestock delivered at a public stockyards such as the Union Stock Yards; this follows from the terms of Section 15(5) of the Act, *infra*, p. 145. Moreover, the Commission has held that the railroads are not required, without extra charge, to unload and reload livestock<sup>9</sup> at intermediate points as required by the 28-hour law when destined for delivery to a private sidetrack. *Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 234 I. C. C. 569. This has the effect of relieving the carriers of the cost of an intermediate service in respect of deliveries of livestock to pri-

vate sidetracks which the carriers must assume in the transportation of livestock to public stockyards. And, finally, the Commission has specifically held that the line-haul rates on livestock are adequate to cover delivery to Swift's sidetrack at the Omaha Packing Co. location on the rails of the Burlington. *Chicago Live Stock Exc. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 546, 547 (Fdg. 10), 548.

The result is that, under the Commission's own rulings, there are specific findings that (1) the line-haul rates are intended to and do cover all transportation services necessary to the delivery of livestock to private sidetracks, and (2) that such transportation services involve less expense to the carrier than do similar shipments to public stockyards, in two respects, *viz.*, unloading and reloading in transit, and unloading at destination. Consequently, the Commission's attempts on general principles to justify the switching charge here in question, which is directed solely against livestock delivered to sidetracks, breaks down completely, and the discrimination against livestock as a commodity is revealed in all its stark inequality.

We do not now urge a further violation of Section 3(1), to the effect that the carriers discriminate against appellant with respect to delivery of livestock at points on their lines other than Chicago. To pursue this contention would involve inquiry as to whether conditions at these other points, where one or more of the railroad appellees here effect delivery of livestock at the flat line-haul rate to the sidetrack of the packer concerned, are similar to or different from those obtaining at Chicago. We call attention here to these other sidetrack deliveries of livestock without switching charges simply to show that what Swift is seeking in this case is no novelty, but that on the contrary the delivery of livestock to the sidetracks of meat packing companies is the normal practice throughout the United States. See Ex. 10 (at R. 1063-1069), offered by appellant, and Ex. 12 (R. 1083-1090), introduced by the railroad appellees, which together include substantially all of the important meat pack-

ing points in the nation, with the sole significant exception of the packing plants on the rails of the Chicago Junction. The consignees at all of these points get what Swift is seeking here, *viz.*, sidetrack delivery of livestock at the line-haul rate.

**B. The switching charge violates Section 2 of the Act because it results in different rates for shipments of the same commodity, over the same line, for the same distance, under the same circumstances of carriage.<sup>6</sup>**

Section 2 of the Act (*infra*, pp. 144-145) forbids rebates and similar devices and likewise forbids the receipt of different compensation "for doing \* \* \* a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions \* \* \*."

The construction of this provision was fixed soon after its passage. See *Wight v. United States*, 167 U. S. 512, 518, where the Court said:—

It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when

<sup>6</sup> Interveners contend (Motion to Affirm, p. 7, n. 4) that appellant can not raise here any issue under Section 2 because that provision was not mentioned in the complaint before the Commission. But the Commission's report states clearly that the legality of the switching charge is the issue (R. 59), and Section 2 obviously bears thereon. Consequently, interveners' contention is completely disposed of by the undoubted proposition that it is not necessary to plead law in a proceeding before the Commission. *Chicago, E. I. & P. Ry. Co. v. United States*, 274 U. S. 29, 36-37; *Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55, 56.

it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

The foregoing standard represents the settled rule for the interpretation of Section 2, both in the decisions of this Court (*Interstate Commerce Comm. v. Alabama M. R. Co.*, 168 U. S. 144, 166; *Interstate Commerce Comm. v. Baltimore & O. R. Co.*, 225 U. S. 326, 341-342; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62) and in the rulings of the Commission (*Import Rates on Manganese Ore*, 25 I. C. C. 663, 668; *Pacific Lumber Co. v. Northwestern P. R. R. Co.*, 51 I. C. C. 738, 760; *Lawrenceville Cooperage Co. v. Akron, C. & Y. Ry. Co.*, 226 I. C. C. 773, 781-782; *R. C. Williams & Co., Inc. v. New York Central R. Co.*, 269 I. C. C. 297, 300).

We propose to show that, as a matter of fact, the transportation of livestock to the Swift sidetrack for the line-haul rate plus \$39.24 per car switching fee, while similar transportation of the same commodity to the Union Stock Yards is made at the line-haul rate without any switching fee, involves a like and contemporaneous service under the same circumstances of carriage. Thereafter we will go on to show that, as a matter of law, nothing in this record justifies the resultant discrimination.

- (i) *As a matter of fact, this case involves like and contemporaneous service under the same circumstances of carriage.*

First. About half of the livestock arriving at the Union Stock Yards by rail represents direct shipments, already owned by the consignees, and is consigned there because such consignees prefer to accept delivery through those facilities (Ex. 28, R. 1117). Among such consignees are Armour & Company, Wilson & Company, and some 20 or so others who, like Swift, operate meat packing plants in or adjacent to the Stock Yards areas, and so are competitors of Swift (R. 947-948; Ex. 29, R. 1118-1121).

Second. A car of livestock consigned to one of Swift's competitors at the Union Stock Yards, and one consigned to Swift at its private sidetrack, follow precisely the same rail movement from point of origin, to the several line-haul carriers' break-up yards in the Chicago Switching District, to the eastern limits of the Junction's Ashland Avenue yards, for precisely the same distance (R. 283-285, 476-478, 480-482, 505, 506-507, 684-685). Beyond this point, as the map, Exhibit B (*infra*, p. 150) shows, the distance to Swift's sidetrack on the Junction is somewhat less than to the Union Stock Yards' unloading pens, also on the Junction; so that the total distance over which the car of livestock would be transported to Swift's sidetrack from point of origin would normally be slightly less than the distance over which a competitor's car of livestock would be transported to the Union Stock Yards from point of origin. But for this slightly shorter journey, Swift must under the Commission's ruling—now sustained by the court below—pay an extra switching fee of \$39.24 per car over and above the amount paid by its competitors at the Union Stock Yards.

Third. As has already been pointed out in the discussion of Section 3(1), substantially over 37% of the livestock arriving at the Union Stock Yards by rail arrives in consolidated trains; such livestock requires additional switching and "set outs" beyond the simpler operation involved in delivering to the same point trains containing livestock exclusively and even as to the latter deliveries, substantial switching is involved before and after arrival in the Chicago Switching District. See pp. 17-21, *supra*. Yet there is no switching charge for the livestock delivered to Swift's competitors at the Union Stock Yards, whether in consolidated trains or otherwise, while cars proposed to be delivered to Swift at its own sidetrack a few city blocks distant, are subject to such a charge in the amount of \$39.24 per car.

Fourth. The services performed at the Union Stock Yards in respect of livestock consigned there, for which yardage fees are charged and paid, are not comprehended within "carriage" or "transportation" by rail. In *Chicago Live Stock Ex. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, the Commission held that the carriers were required to deliver livestock at the pens of the Union Stock Yards on the Junction rails without any terminal charge in addition to the line-haul rates (which latter had previously been prescribed in *Livestock—Western District Rates*, 176 I. C. C. 1). Subsequently, the Commission ruled that the transportation of direct shipments of livestock "ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards" (*Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179, 196), and this Court held, sustaining the Commission, that it had "properly decided that transportation ended when the livestock reached the unloading pens" at the Union Stock Yards. *Swift & Co. v. United States*, 316 U. S. 216, 231. Since Section 2 relates only to "the matter of carriage", see *Wight v. United States*, *supra*, 167 U. S. at 518, it follows that any yardage charges paid after transportation has ended are not factors which may properly be considered in determining whether the carriers are providing that equality of rates for like services which Section 2 enjoins upon them.

(ii) *As a matter of law, Section 2 applies to all deliveries in the same terminal or switching district.*

The foregoing facts bring the present case squarely within the decisions which hold that Section 2 applies to all deliveries within the same terminal or switching district. *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, sustaining the Commission's report in *Richmond Chamber of Commerce v. Seaboard A. L. Ry.*, 44 I. C. C. 455; *Albers Bros. Milling Co. v. Great Northern Ry. Co.*, 256 I. C. C. 491; *Minneapolis Traffic Assn. v. Chicago & N. W.*

*Ry. Co.*, 266 I. C. C. 729; *Williams Lime Mfg. Co. v. Southern Ry. Co.*, 279 I. C. C. 561.

The *Richmond* case involved a situation where, when freight was received at a point served by any two or more of the carriers concerned, the switching charge was absorbed if the freight was delivered on the line of either, but not if delivery was to an industry served only by a non-competitive carrier. The Commission found that these practices involved an unlawful discrimination under Section 2, saying (44 I. C. C. 455, 464-466):

Section 2 is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. \* \* \*

\* \* \* where the industries are situated within the switching district of the same city and are substantially equidistant from the respective interchange tracks, we are of the opinion that the service which the line-haul carrier renders, whether the traffic is ultimately destined to industry B or industry C, is like service within section 2. It is the line-haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another.

That determination was sustained by this Court in *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62, the Court saying:

We are of the opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight v. United States*, 167 U. S. 512 \* \* \*.

Here, as in the *Richmond* case, Swift and the Union Stock Yards are on the lines of the same carrier, the Chicago Junction, and within the same switching district; and the distance from the interchange point to Swift's sidetrack is slightly less than to the Stock Yards pens (*supra*, pp. 15-16). Application of the *Richmond* rule, therefore, would have produced a result quite the opposite of that actually reached by the Commission in the present case.

The *Richmond* rule, *viz.*, that Section 2 applies to all deliveries within the same switching district, was followed by the Commission in *Albers Bros. Milling Co. v. Great Northern Ry. Co.*, 256 I. C. C. 491; it was followed by the Commission in *Minneapolis Traffic Assn. v. Chicago & N. W. Ry. Co.*, 266 I. C. C. 729, 768; and it was again applied by the Commission, after its ruling in the present case, in *Williams Lime Mfg. Co. v. Southern Ry. Co.*, 279 I. C. C. 561. Thus, so far as the Interstate Commerce Commission is concerned, the *Richmond* rule is law everywhere except on the tracks of the Chicago Junction when livestock is being delivered to sidetracks.

In the *Williams Lime Mfg. Co.* case, to take the latest example, complaint was made because the defendant carriers failed to accord the flat Knoxville rates on inbound shipments of coal, and outbound shipments of lime, crushed stone, and cement, to and from complainant's plant at South Knoxville, while according such rates to other industries within the Knoxville industrial area. The Commission found that there was no undue prejudice in violation of Section 3(1), and further found that the rates were not unreasonable in violation of Section 1(5). But it found that there was none the less an unjust discrimination in violation of Section 2, because (279 I. C. C. at 566):

The Southern receives its published charge for switching Louisville & Nashville line-haul traffic to industries at present accorded Knoxville rates and it is entitled to reasonable compensation for such service, but since the service performed to and from complainant's plants is shown to be substantially the same

as that performed for the Louisville & Nashville in connection with like traffic on which the Southern's charge is absorbed by the Louisville & Nashville, there is no sound basis for greater charges on the complainant's traffic than on like traffic accorded the Knoxville rates. See *Albers Bros. Milling Co. v. Great Northern Ry. Co.*, 256 I. C. C. 491, at pages 498 and 499.

An order was entered accordingly.

*Barringer & Co. v. United States*, 319 U. S. 1, is not to the contrary. That case dealt with tariffs which eliminated a loading charge on cotton moving from points in Oklahoma to certain points on the Gulf of Mexico, while retaining it on cotton moving to the Southeast. The question was whether the Commission erred in refusing to set aside those tariffs. See *Loading Cotton in Oklahoma*, 248 I. C. C. 643. Since the cotton shipments involved were destined to different rate territories, and moved over different railroads at different rate levels to reach their destinations, the case obviously did not involve the Section 2 situation of "shipping over the same line, the same distance, under the same circumstances of carriage" (*Wight v. United States*, 167 U. S. 512, 518, *supra*). Therefore, while the *Barringer* case is authority for the proposition that the rates there considered were not unduly prejudicial in violation of Section 3(1), anything therein said as to the effect of Section 2 is, we submit with deference, mere dictum.

In view of the Commission's rulings, cited above, pp. 72-73, to the effect that Section 2 applies to all deliveries within the same terminal or switching district, and its other line of cases, holding that Section 2 does not apply where the deliveries in question have been over different lines (*Philadelphia Commercial Traffic Mgrs. v. Baltimore & O. R. R. Co.*, 104 I. C. C. 173, 177; *Richfield Oil Corp. of N. Y. v. Central R. Co. of N. J.*, 232 I. C. C. 505; *Gar Wood Industries, Inc. v. Alton & S. R.*, 263 I. C. C. 611, 616; *Mobile Traffic Assn. v. Georgia & F. R.*, 266 I. C. C. 483, 488; *R. C.*

*Williams & Co., Inc. v. New York Central R. Co.*, 269 I. C. C. 297, 300), it follows that the Commission's standards for the applicability or otherwise of Section 2 have hardened into fixed rules to such an extent that deviation from those rules for the purposes of a particular case involves the exercise, not of an informed discretion, but of arbitrary action contrary to law.

We submit, therefore, that the present case, which involves deliveries within the same switching district after movements over the same lines, falls within Section 2 as a matter of law.

(iii) *As a matter of law, the existence or non-existence of trackage contracts can not justify or excuse violations of Section 2.*

The only possible distinction in this record between the physical delivery of livestock to Swift at its own sidetrack and to Swift's competitors at the Union Stock Yards is that, under trackage agreements, the movement from the east end of the Ashland Avenue yards to the chutes of the Union Stock Yards is performed by motive power of the line-haul carrier, while to the Swift sidetrack it is performed by motive power of the Junction. (R. 60, 72.)

We submit that, under well-settled principles, the mere fact that the Junction elects to permit line-haul carriers to effect delivery from the eastern end of the Ashland Avenue yard to the Union Stock Yards by their own motive power, for a trackage charge, while with respect to deliveries of the identical commodity to Swift's sidetrack, it agrees with the line-haul carriers to perform the switching service by Junction motive power, is not sufficient to take the resultant disparity rates out of the anti-discrimination rule laid down by Congress in Section 2.

For, obviously, no voluntary agreement can be permitted to justify discrimination or to relieve carriers from the substantive requirement of equal treatment of shippers prescribed by Section 2 and a multitude of other provisions of

the Interstate Commerce Act. *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, and cases there cited. And trackage agreements are simply voluntary agreements between carriers under which one carrier is permitted to operate its motive power and move its cars over the tracks of another carrier. Consequently, as the Commission itself has pointed out, "Trackage arrangements have been considered by the Commission in a number of cases, in none of which have we ever allowed the contracting carriers under cover thereof to work unjust discrimination against shippers or localities." *Huerfano Coal Co. v. Colorado & S. E. R. R. Co.*, 41 I. C. C. 657, 659, citing many rulings. Or, as was said in *Benton Coal Mining Co. v. Chicago, B. & Q. R. R. Co.*, 63 I. C. C. 396, 399: "We have repeatedly held that trackage arrangements can not be used as a cloak to cover unjust discrimination."

This Court's holdings are to the same effect. In *United States v. Pennsylvania R. Co.*, 266 U. S. 191, it was specifically held that neither the existence nor the absence of trackage rights could justify an unjust discrimination otherwise prohibited by Section 2. And in the recent case of *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, it was ruled that a railroad, operating over a portion of track owned by another, could not justify discriminatory practices in reliance on the covenant to discriminate contained in the very trackage agreement pursuant to which it used the track segment in question.

It is no answer for the appellees to urge that Swift may consign its livestock to the Union Stock Yards and there be free of the \$39.24 per car switching charge. For then its livestock would be subject to yardage fees, which are not included in transportation and which the Commission has no power to regulate. *Swift & Co. v. United States*, 16 U. S. 216. And of course, when Swift seeks delivery to its own sidetrack, delivery to the Union Stock Yards could not be a good delivery. *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727. The essential vice of the

Commission's ruling is that, through the operation of the high switching charge, it enforces delivery of livestock to the Stock Yards, the owner of the Junction property, thus enriching the Union Stock Yards & Transit Co. by the collection of fees for stockyards services which are neither necessary nor desired where a consignee is in a position to take delivery on his own sidetrack. Consequently, from still another aspect, the Commission again does indirectly what would not be lawful if done directly.

To the extent that delivery of livestock at Swift's sidetrack requires Swift to bear the cost of unloading, while when livestock is delivered at the Union Stock Yards the carriers are required to absorb that cost, the ensuing differentiation results from the terms of Section 15(5) of the Act (*infra*, p. 145), and so is lawful. But beyond that, the discrimination whereby Swift must pay \$39.24 more per car of livestock than its competitors do, where both ship from the same point of origin, over the same distance (except that to Swift's sidetrack the distance is slightly less) and under identical circumstances of carriage except for the ownership of the final switching engine, is clearly unlawful by reason of Section 2.

(iv) *Where discrimination is plain, there is no room for "expertise".*

The minutiae of the car movements over the last few city blocks of the aggregate distance involved are obviously immaterial, and are disposed of by what this Court said in *Mitchell v. United States*, 313 U. S. 80, 97:

On the facts here presented, there is no room \* \* \* for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

Here, as in the *Mitchell* case, the Commission has been guilty of pushing into view the burdens which the render-

ing of equal treatment might place on the carriers, and of putting out of view the palpable discriminations visited upon the users of the carriers' facilities. In both instances, the Commission's reports reflect an "expertise" that concentrated primarily on finding reasons for continuing clear and obvious discriminations.<sup>7</sup> Contrariwise, neither here (R. 58-81) nor in the *Mitchell* case (229 I. C. C. 703) do the majority views to the Commission's reports indicate the slightest zeal for wiping out what this Court has over many years repeatedly characterized as the principal target of the Interstate Commerce Act—"the evil of discrimination". *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 749-750; *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 512; *Mitchell v. United States*, 313 U. S. 80, 94; *New York v. United States*, 331 U. S. 284, 296; *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, 175; *Shreveport Rate Case*, 234 U. S. 342, 356. Indeed, the Commission's report in the present case and the contentions now made in its support echo the arguments, made by the Commission and rejected by this Court in *Henderson v. United States*, 339 U. S. 816, to the effect that "the railroads know best", and that factual determinations by the Commission as to what is and what is not discrimination are unassailable.<sup>8</sup>

<sup>7</sup> In the *Mitchell* case, the Commission concluded (*Mitchell v. Chicago, R. I. & P. Ry. Co.*, 229 I. C. C. 703, 711):

\* \* \* we find that the present colored-passenger coach, and the pullman drawing room meet the requirements of the act; and that, as there is comparatively little colored traffic, and no indication that there is likely to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice is plainly not unjust or undue. Only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove, and prevent.

<sup>8</sup> See Brief for the Interstate Commerce Commission in the *Henderson* case, No. 25, Oct. T. 1949:

On the sole basis of equal treatment, the Commission has long been regarded by the courts as possessed of an informed judgment, needed for such decisions. (p. 58) \* \* \* Only a vivid imagination could discover

**C. The switching charge violates Section 1(9) of the Act because it prevents the switch at appellant's sidetrack from being operated without discrimination.<sup>9</sup>**

Section 1(9) of the Interstate Commerce Act (*infra*, pp. 143-144) provides in pertinent part that

Any common carrier subject to the provisions of this part, upon application of \* \* \* any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any \* \* \* private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.

All of the requirements laid down in the statute have been complied with. The switchtrack in question is now and has been in operation for many years (R. 65, 268, 270-

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inequality in the treatment accorded colored interstate passengers as revealed by this record. (p. 59)

\* \* \* \* \*

It is to be supposed that the carrier knows its business, what is economically best, and what the vast majority of its patrons prefer in equipment and service. (p. 67) \* \* \* At least experienced and informed railroad officials regard segregation as essential to their business, in order to keep peace and order between the races. (p. 68)

\* \* \* \* \*

Questions of violations of the Act and equality of treatment require decisions under the facts of each case, a function exclusively for administrative action, here the Commission. As long recognized by this Court, review of such fact decisions is very limited, and where there is a rational basis for the administrative judgment, courts do not interfere. (pp. 102-103).

<sup>9</sup> Although Section 1(9) was not specifically cited in the complaint before the Commission, it is available here for the reason set out in footnote 6, p. 69, *supra*: It is not necessary to put a law before the Commission, any more than before a court.

271, 276-277; Exs. 2-4, 6, 8, R. 1041-1045); it has been used for shipments of all dead freight, including perishables, to and from the Swift plant. That circumstance alone establishes that it furnishes sufficient traffic, besides which the livestock proposed to be transported in addition averages nearly 20 cars a day.<sup>10</sup> And Swift duly made application to have the switch operated without discrimination (Ex. 10 at R. 1047-1048).

Or, as Commissioner Alldredge said (R. 86),

Inasmuch as Swift's track has already been connected and is proposed to be operated in the handling of cars containing other kinds of freight than livestock, it seems conclusive that all the conditions set forth in section 1(9) have been met. In that event, it is the duty of the Chicago River and Indiana Railroad Company to operate the track for all kinds of traffic, including livestock, without discrimination. That is clearly the obligation of the statute.

And, the learned Commissioner might have added, that is precisely how the Commission has construed the statute in every case—save this one alone—and notably in *Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55, where it required the carriers, who were delivering every commodity except livestock over an existing sidetrack to Swift's plant at Cleveland, to operate the switch to that sidetrack without discrimination, and to deliver livestock as well. The Commission's order in that case was sustained by this Court in *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, reversing the district court, which had enjoined enforcement of the order. *Baltimore & O. R. Co. v. United States*, 71 F. Supp. 499 (N. D. Ohio).

A similar ruling was made by the Commission in *Trojan Scrap Iron Corp. v. Boston & M. R.*, 270 I. C. C. 727, where the railroad refused to provide transportation to and from

<sup>10</sup> Twenty cars a month was held sufficient traffic to support an order directing the railroad to perform switching service in *Trojan Scrap Iron Corp. v. Boston & M. R.*, 270 I. C. C. 727, 730.

industries on Front Street in Troy, N. Y., "because it regards the operation over the Front Street track as difficult and expensive." *Id.* at 728. The railroad made a considerable showing of operating difficulties, see 270 I. C. C. at 728-729, but the Commission held that neither practical operating difficulties nor congestion could excuse the refusal to switch loaded cars to the track in question. Indeed, in the case of *City of Milwaukee v. Chicago & N. W. Ry. Co.*, 279 I. C. C. 521, decided after the ruling complained of here, the Commission required the Milwaukee road to provide switching service to the city's harbor terminal even though such service involved crossing the North Western road's right-of-way, in the face of the latter's refusal to grant permission therefor. Except in the present case, accordingly, the Commission has never been in doubt as to its power to compel carriers to comply with the requirements of Section 1(9).

But it is contended by the appellees here that Swift is complaining only of the measure of the charge, which, they assert, is irrelevant to Section 1(9) (see answer of railroad interveners, par. XXXVI, R. 120), and, moreover, that since Swift can receive livestock at its sidetrack upon payment of the switching fee, there is no violation of the statutory provision (I. C. C. Motion to Affirm, p. 21; Interveners' Motion to Affirm, p. 10).

Such an interpretation of Section 1(9) would effectually eliminate that provision from the law. Under that view, a railroad might indeed operate a switch connection, but, by a discrimination of \$100 per car between shippers—or, for that matter, of \$39.24 per car—close the connection to a particular shipper just as effectively as if the switch connection itself had been physically torn up. The statute simply does not permit of any such reading. And, moreover, the words in Section 1(9), "without discrimination", are not modified by any of the elastic adjectives such as "undue" or "unreasonable" that are to be found in Section 3(1) of the Act.

Nor does the contention just set forth fully measure the extent of the Commission's disregard of the plain provisions of the Interstate Commerce Act. The Commission's report rests in substantial part on the supposed interest in the "expeditious centralized delivery" of livestock at the Union Stock Yards (R. 71). But Section 1(9) says nothing of "expeditious centralized delivery." To the contrary, it provides that, after a switch connection is in operation, and the one here in question has been operated for years, it then becomes the duty of the carrier to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." The statute thus protects expeditious *decentralized* delivery at private sidetracks—a command which the Commission, and the court below, have completely disregarded.

Looking to the provisions of the Interstate Commerce Act as a whole, it is plain that Section 1(9) was intended in the nature of a charter of liberty for the owner of a private sidetrack, affording him direct access to the rail network of the nation. In its earlier decisions, particularly the one dealing with the discrimination practiced against the present appellant at Cleveland (*Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55), the Commission gave effect to this underlying purpose. The same can be said of its later rulings (*Trojan Scrap Iron Corp. v. Boston & M. R.*, 270 I. C. C. 727; *City of Milwaukee v. Chicago & N. W. Ry. Co.*, 279 I. C. C. 521). Only in the present case has the Commission failed in its duty of enforcing the purpose—and the plain provisions—of Section 1(9).

**D. No decision of this Court sanctions the present switching charge, and *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, specifically condemns it.**

Apart from the question whether present or future congestion can render lawful a discrimination as obvious as the one here involved—a matter which we discuss at length

under Point III, *infra*, pp. 90-104—we contend that no decision of any court (other than the ruling under review) gives any sanction to the high additional switching charge assessed only against livestock consigned to sidetracks, and that, to the contrary, it is specifically condemned by this Court's recent decision in *United States v. Baltimore & O. R. Co.*, 333 U. S. 169.

1. Appellees' position appears to be that the legality of the present switching charge was affirmatively sustained in *Atchison, T. & S. F. Ry. Co. v. United States*, 295 U. S. 193.

Thus, the Commission says (I. C. C. Motion to Affirm, p. 20):

The issues involved in this appeal are the same as were before the Court in *Atchison, T. & S. F. Ry. v. United States*, 295 U. S. 193, in which the Court only reversed the Commission insofar as it failed to make adequate findings in support of its order with respect to the yardage charges assessed by Union.

And further (I. C. C. Motion to Affirm, pp. 9-10):

This charge, now said to be prohibitive and assessed as a penalty, is the identical charge, subject to certain general increases, which the Commission held to be reasonable in *Hygrade Food Products Corp. v. Atchison T. & S. F. Ry. Co.*, 195 I. C. C. 553 (1933). The holding as to the reasonableness of the rate was not questioned or disturbed by the Supreme Court on appeal in *Atchison T. & S. F. Ry. Co. v. United States*, 295 U. S. 193 (1935).

The interveners, likewise, assert that "this appeal involves the same questions before the Court in *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 295 U. S. 193," saying (Motion to Affirm, pp. 7-8):

As shown by the Commission's report in that case (*Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553) the Hygrade Company, a Chicago packer with a plant located in the same area as appellant's packinghouse, filed a complaint with the Commission alleging, among other things, that the pub-

lished switching charge in addition to the line-haul rates for delivery of livestock at its private track, was unreasonable, discriminatory, prejudicial and preferential. (195 I. C. C. at 553.) The switching charge attacked in that case was the identical charge assailed by appellant in this proceeding, subject only to authorized general rate increases since that time, and the Commission so found. (274 I. C. C. 557 at 573.) The Commission found in that case, as it has in this proceeding, that "the assailed switching charge on carloads of livestock placed for delivery at complainant's plant is not shown to be unreasonable or otherwise unlawful." (195 I. C. C. 553 at 558.) On appeal to this Court, the Commission's finding as to the lawfulness of the switching charge was specifically noted in language that leaves no doubt as to the similarity between that proceeding and this. The Court stated:

"Consignee sought free delivery in cars switched into its plants, but the Commission found the switching charge not unreasonable" (295 U. S. 193 at 200).

The most charitable characterization of the appellees' contention that the issue involved in the present case has already been before this Court is that it involves a bizarre misreading of the earlier controversy.

For the question of the legality of the switching charge was simply not in issue in the judicial proceedings. Before the Commission, Hygrade attacked both the switching charge and the yardage fees. The Commission's ruling was adverse to Hygrade on the switching charge, and in its favor on the yardage fees. The railroads and the Union Stock Yards then sued to set aside the Commission's order in respect of the yardage fees, see *Atchison, T. & S. F. Ry. v. United States*, 8 F. Supp. 825 (S. D. N. Y.), but Hygrade, although it intervened in the suit, did not seek affirmative relief in respect of the switching charge. See Hygrade's answer, R. 50-54, Nos. 606-607, Oct. T. 1934. The question of the legality of the switching charge, therefore, did not even lurk in the record when the case reached the courts, and indeed all that was actually decided by this Court was

that the Commission's findings were inadequate to support its order as to the yardage fees. To say, therefore, that the *Atchison* case in 295 U. S. involved the same questions as this case does is simply to make an assertion that is demonstrably not so.

2. Thereafter, when the yardage fee question was again squarely raised, the Commission completely reversed itself, *Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179, and when that ruling in turn came before this Court, in the so-called "Egress Case", the Commission's order was sustained. *Swift & Co. v. United States*, 316 U. S. 216. But in the later proceeding, the only question passed upon concerned shipments consigned to Swift and other packers at the Union Stock Yards, and the issue involved in the present case was expressly reserved. The Court said (316 U. S. at 227):

It does not appear, however, that the existence or adequacy of alternative facilities for delivery at other points is particularly important in the case, because the shipments involved are consigned to the packers at the Union Stock Yards by their own choice. It does not appear that they are demanding an increase of other facilities, and the case has not been considered in that light.<sup>41</sup>

3. The controlling precedent here, in our view, is *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, which declared unlawful a very similar discrimination at the Cleveland Stock Yards.

There, as here, Swift's sidetrack was physically connected with the carrier's main track. There, as here, the carrier was prepared to deliver livestock at Swift's sidetrack upon payment of a substantial additional charge levied on livestock alone. Here that charge is demanded by a terminal carrier, there it was demanded by the Cleveland

<sup>41</sup> The Commission had similarly disclaimed passing on any question involving requests for delivery elsewhere than at the Union Stock Yards. See *Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179, 189.

Stock Yards which owned a segment of the track that connected Swift's sidetrack with the main line. In the Cleveland case, the line-haul carrier had for a number of years paid the extra charge to the Stock Yards (R. 34, No. 223, Oct. T. 1947), while here the line-haul carriers have never paid such a charge and refuse to do so now (Ex. 10 at R. 1047-1052, 1073).

There, as here, Swift as well as other packers were denied switching service as to livestock although given it as to other commodities.<sup>12</sup>

There, as here, the discrimination was effected and sought to be justified by a contract between the carrier and the particular stockyards owning part or all of the physical tracks involved. In the Cleveland case, the agreement between the Stock Yards and the New York Central, which granted the latter "the free and uninterrupted use" of the Stock Yards' track, included a clause, "except for competitive traffic a charge for which use shall be the subject of a separate agreement"—and "competitive traffic" meant livestock. Here the Union Stock Yards, owner of the fee of the Chicago Junction, leased that property on condition that the lesser agree "to conduct, manage, and operate the line of railroad by this instrument demised, and insofar as possible, the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards" (Ex. 57, R. 1961). Here,

<sup>12</sup> The interveners do not present the full facts of the Cleveland case when they say (Motion to Affirm, p. 10), "The defendant carriers continued to perform that service for appellant's competitors while refusing it to appellant." That statement is correct only as to certain of Swift's Cleveland competitors—Long Dressed Beef Co., Lake Erie Provision Co., and Ohio Provision Co.—who had sidetracks connected directly with the main line of the New York Central. But those of Swift's competitors such as Koblenzer Co., who, like Swift, could be reached only via the segment of track owned by the Cleveland Stock Yards, were treated just as Swift was. As this Court's opinion points out (333 U. S. at 174), "in 1938 the railroads ceased delivering livestock to the sidings of Swift and other packers served by Spur No. 245, although they have under agreement with Stock Yards continued to use the spur for delivery of all other kinds of commodity shipments to these sidings." (Italics added.)

as there, accordingly, the carriers undertook to act in the interest of the stockyards-landlord at the expense of the consignees, by refusing to deliver livestock at the consignees' sidetrack except upon payment of a substantial additional fee not demanded in respect of any other commodity.

It would be difficult, we submit, to find two cases which are closer on their facts—and equally difficult to find two which are farther apart in their results. For while in the Cleveland case the Commission specifically found violations of, *inter alia*, Sections 3(1) and 1(9) of the Interstate Commerce Act (*Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55), here the Commission refused so to find, and referred to that and similar decisions only to distinguish them. It said (R. 79):

Deliveries to private industrial tracks at those points did not require substantial modification of terminal operations and interferences with established operations in a manner required at Chicago for such deliveries, and did not involve, as at Chicago, serious disruption of operations. There is no showing of a similarity in any respect of the services required and circumstances affecting services.<sup>13</sup> There is no showing that services as desired will result in a situation similar to that at a point or points alleged to be preferred.

Neither the Commission's report nor its Motion to Affirm undertakes to discuss or analyze the Cleveland Stock Yards case in this Court, *United States v. Baltimore & O. R. Co.*,

<sup>13</sup> The finding in this sentence is almost diametrically opposed to the Commission's finding on the same point in an earlier case, *Chicago Live Stock Ex. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 538:

Although these facts do not establish that the terminal operations at the points mentioned [E. St. Louis, S. St. Paul, Sioux City, Omaha, St. Joseph, Milwaukee, Indianapolis, Kansas City] are identical with those at Chicago, it is clear that the character of the services rendered and the charges at the compared points do not vary greatly.

333 U. S. 169.<sup>14</sup> Since the Commission does not in any sense question the principles of law there laid down, it must follow that, in the Commission's view, an obvious discrimination violating numerous specific provisions of the Act is perfectly lawful whenever the removal thereof would involve "substantial modification of terminal operations and interferences with established operation" or "serious disruption of operations" (R. 79). Such an approach, assuredly, exalts the *status quo* of discrimination far beyond any level it has hitherto attained, and enacts, not Social Statics (*cf.* Holmes, J., in *Lochner v. New York*, 198 U. S. 45, 75), but a species of Railroad Statics. It is sufficient to say that, but for the rulings under review, no trace of any authority to support such a doctrine can be found in the books. To the contrary, as this Court prophetically pointed out about a generation ago (*Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 568, *per* Brandeis, J.), "Transportation conditions are not static."

The Commission's ruling on this aspect of the case is plainly wrong in its interpretation of the governing Act, and so is not saved by appellees' attempts to clothe the result in the language of discretion. For, as the railroad appellees' chief of counsel significantly pointed out some years back (Kenneth F. Burgess, *Federal Regulation of Railway Management and Finance*, 37 Harv. L. Rev. 705, 743),

The Commission must act within the statute of its creation, conforming its decisions to the power therein contained, and arbitrary action by it can not be sustained on the ground that its action is purely discretionary.

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<sup>14</sup> Interveners, after quoting from the Commission's report the quoted statement that "There is no showing of a similarity in any respect of the services required and circumstances affecting services," argue that our reliance on the *Cleveland* case "thus utterly disregards the fact that dissimilar situations produce different results" (Motion to Affirm, p. 11). We submit that we have sufficiently demonstrated the similarity between the two cases.

### III. NEITHER PRESENT NOR FUTURE CONGESTION JUSTIFIES OR RENDERS LAWFUL A CHARGE OTHERWISE DISCRIMINATORY.

The burden of the Commission's report, and of the arguments which have been made in its support, is that to accord to Swift the non-discriminatory service to which it would otherwise be entitled under the plain provisions of the Interstate Commerce Act set out and discussed above, pp. 63-83, would (R. 77) "seriously interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally", and, also, that it would involve changes in a method of delivering livestock which has been in effect for many decades. In short, it is sought to justify discrimination on the ground of congestion, inconvenience, and long-continued practice.

No authorities are cited for the proposition that these factors, or any of them, will justify a course of conduct otherwise discriminatory, and we are confident that none can be found. The rulings under review stand alone. For up to now the law has always been that the circumstance that a particular practice has been long continued does not render it immune if in law or in fact such practice is later held violative of the Interstate Commerce Act. *Merchants Warehouse Co. v. United States*, 283 U. S. 501; *Louisville & N. R. Co. v. United States*, 282 U. S. 740; *American Express Co. v. United States*, 212 U. S. 522. Up to now the law has always been that the possibility of disruption does not remotely justify discrimination. *Interstate Commerce Commission v. Mechling*, 330 U. S. 567. And up to now the law has always been that inadequacy of facilities does not legalize a discriminatory rate or practice, and that, where discrimination is palpably unjust and forbidden by the Act, "there is no room \* \* \* for administrative or expert judgment with respect to practical difficulties." *Mitchell v. United States*, 313 U. S. 80, 97. Nor does the fact that a carrier does not own tracks or trackage rights justify it in discriminating against particular patrons.

*United States v. Pennsylvania R. Co.*, 266 U. S. 191, 198-199; *United States v. Baltimore & O. R. Co.*, 333 U. S. 169.

To the contrary, a carrier must supply adequate facilities to the extent that it is able to do so, see Sections 1(10) and 1(11), *infra*, p. 144, and, to the extent that it is unable with the exercise of reasonable energy and diligence to do so, its available facilities must be equitably prorated.

**A. The burden of congestion must be borne equitably by all users of congested facilities and may not be assessed in its entirety against a single commodity consigned to a single shipper.**

It was early recognized that "Most of the provisions of the Interstate [Commerce] Act but re-enact the common law and supply some new, while saving all the old remedies." *Larrison v. Chicago & Grand Trunk Ry. Co.*, 1 I. C. C. 147, 149 (1887); cf. *Arizona Grocery v. Atchison Ry.*, 284 U. S. 370. And the common law of carriers laid down the rule of equality of treatment. The carrier was bound to receive all goods and passengers, up to the limit of his capacity. Angell, *Carriers* (2d ed. 1851) sec. 124; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 382-383; *Riley v. Horne*, 5 Bing. 217, 220-221: "He *must* take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage." [Italics in original.] It was only when the tender was beyond his capacity that the carrier was excused from failure to serve. Chitty, *Carriers*, \*23; Angell, *Carriers* (2d ed. 1851) sec. 125; Hutchinson, *Carriers* (1st ed. 1880) secs. 114, 296; *Lovett v. Hobbs*, 2 Show. 127. The law exacted from the carrier only what was reasonable, but required in turn that he be reasonable in the treatment of his patrons; even at common law, preferences were illegal, and the carrier was obliged to carry for all alike. Hutchinson, *Carriers* (1st ed. 1880) sec. 297; Chitty, *Carriers*, \*25; *McDuffee v. Railroad*, 52 N. H. 430; *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L.

407; cf. *New England Express Co. v. Maine Central Railroad Co.*, 57 Me. 188.

The same rules were carried over into the administration of the Interstate Commerce Act, and were specifically recognized by the Commission in one of its earliest reports. See *Riddle, Dean & Co. v. New York, L. E. & W., etc., R. R. Cos.*, 1 I. C. C. 594, 603, 604, where the Commission said:

It is the duty of a common carrier to provide adequate equipment for the business of his line; if in time of special pressure some one must wait, the annoyance must be distributed with all possible equality. \* \* \* The common carrier has no right to select either goods or customers.

But for the report now under review, that has been the settled doctrine applied by the Commission.

The principle of equality has been most contested in situations of car shortages, when the available supply of cars of a particular class has been insufficient to meet the demands of shippers therefor. Where the carrier's regulation for such situations has been disregarded by the carrier itself, with resultant discrimination, the injured shipper has been held entitled to sue for damages as at common law: *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121; *Illinois Cent. R. R. v. Mulberry Coal Co.*, 238 U. S. 275; *Pennsylvania R. R. v. Sonman Coal Co.*, 242 U. S. 120. Where, however, it is the reasonableness of the carrier's rule which is attacked, the shipper must resort to the Commission in the first instance. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304; *Midland Valley R. R. v. Barkley*, 276 U. S. 482.

The Commission over the years devoted considerable time and study to the problem of car shortages, laying down first one formula and then another. See *Assigned Car Cases*, 274 U. S. 564, *passim*. Eventually it devised a rule designed "to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its ratable share of the

aggregate available coal transportation facilities" (*id.*, at 573), and that rule was sustained in the case cited. There is no suggestion in the careful opinion in the *Assigned Car Cases* that any other reasonable plan for attaining the same result would have been held unlawful or unauthorized, but, assuredly, nothing in that decision—nor in any other ruling of this Court that we have found—suggests in the slightest degree that the Court would have been willing to sanction an inequitable rule simply because discrimination represented the easier course.

The purported basis for justifying the present switching charge is that the congestion in the stockyards area on the tracks of the Chicago Junction is such that non-discriminatory service should not be rendered. This has the effect of assessing the entire cost of the congestion against a single commodity consigned to a single shipper. We submit that such a result is plainly illegal, that it is without precedent, and that it is condemned by every decision under the Act. Or, as Commissioner Allredge put it below (R. 88-89)—

The action of the majority in authorizing an extra switching charge to deliver livestock at Swift's plant, on the ground that such additional compensation is justified by reason of an increased congestion of the yard operations and facilities, introduces a novel idea into the field of railroad regulation. Under such a theory the tendering of shipments of any kind to a railroad in excess of the capacity of its regular train schedules might well give rise to the assessment of an extra charge on the surplus shipments. The terminals of railroads and other agencies are subject to periods of congestion, particularly at the larger centers, which frequently occasion overtime work or the employment of additional help to restore normal conditions. While embargoes are often employed as an aid in overcoming difficulties of this kind, there is no record of an attempt to resort to the use of extra transportation assessments as a recompense to the carriers for the extra costs entailed. It is familiar practice, for instance, for carriers to run extra busses or passenger trains out of various terminals on week ends to take

care of overflows of passengers. If pursued to its ultimate conclusion, the principle which the majority here enunciates would authorize the charging of additional compensation to the overflow passengers. Such an idea is too closely akin to a punitive measure to be just and reasonable. A search of the authorities reveals no warrant of law for such action. As a matter of fact, it is condemned by the decision cited and quoted from in the preceding paragraph hereof. [*Pennsylvania R. Co v. Puritan Coal Mining Co.*, 237 U. S. 121.]

There is no more justification for assessing an extra charge against Swift for the switching of livestock in this instance than there would be for charging additional compensation over and above the line-haul rates on all traffic passing through the yards in question. If the handling of a heavy volume of traffic through the yards with Swift's livestock cars added should actually contribute to a higher rather than a lower cost per car, which is doubtful to say the least, then the additional cost should be distributed over all traffic flowing through the yards rather than be charged to one shipper alone.

Under the contrary theory, espoused by the Commission, the tendering of shipments of any commodity to a carrier, in excess of its current capacity, would give rise to an extra charge in respect of the surplus shipments. But for the rulings under review, no such proposition has yet been suggested for railroad traffic. Embargoes are frequently issued in instances of congestion, *e. g.*, against export traffic to particular port cities because of accumulations at those terminals beyond the capacity of vessels to transport and so clear the terminals. But in such instances no extra charge has ever been assessed, either against the traffic which was moved, or against the traffic which was delayed.

During the late war, the Government issued many priority orders for the immediate or preferred movements of essential defense materials. Such orders, clearly, were made necessary only by congested conditions; for, obviously, if the railroads could have transported all traffic

promptly as offered, there would have been no need for priority orders. But there was never any extra charge assessed, either for the traffic given preference under the priority order, or for the traffic which contributed to the congestion that necessitated such an order.

Similarly, passenger coaches are frequently overcrowded, at rush hours and during holiday seasons. But it has never yet been suggested that such conditions of congestion authorize the assessment of an extra charge on the passenger who, forced to stand in the aisle, produces the overcrowding.

The short of the matter is that the theory underwritten by the Commission in the present case, *viz.*, that where there is congestion, all of the cost thereof may be assessed against the additional traffic, is not only repugnant to the substantive antidiscrimination provisions of the Interstate Commerce Act, it is contrary as well to accepted custom and practice.

The only reply to any of the foregoing, whether in the Commission's report or in the briefs of the several appellees, is the argument *ab inconvenienti*; and under the rulings of this Court already cited, that is insufficient.

**B. In any event, a carrier is not permitted to refuse service now on the ground that in the future its facilities may become overcrowded; and there is no substantial evidence to support the Commission's finding that the other packers would immediately make like demands for sidetrack delivery of livestock.**

*A fortiori*, a carrier has no right to deny service now on the ground that in the future its capacities may be overtaxed. Denial of service by the carrier can be justified "if his coach be full"—and then only. As this Court said *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133:

The common law of old in requiring the carrier to receive all goods and passengers recognized that "if

his coach be full" he was not liable for failing to transport more than he could carry. *Hutchinson on Carriers*, 146; *Lovett v. Hobbs*, 2 Shower, 127; *Riley v. Horne*, 2 Bing. 217; *Peet v. Ry.*, 20 Wisconsin 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not, identically.

This rule is apparently not controverted by the appellees but its application rests on two issues which must now be canvassed, the first being whether, if Swift's demand were granted, the other packers would join Swift and insist on similar switching service. The Commission found that (R. 76) "if complainant's demand for the delivery service at the line-haul rate were granted, there would result demands from other packers requiring defendants to render like delivery service \* \* \*". Commissioner Alldredge thought this was a mere "speculative possibility" (R. 88).

In resolving this difference, consideration must necessarily be given to the standard of review. This Court has held, *Riss & Co v. United States*, 341 U. S. 907, that Sections 5, 7, 8, and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007, 1010) apply to proceedings before the Interstate Commerce Commission. And Section 10(e)(B)(5), *infra*, pp. 146-147, specifically provides for setting aside agency findings that are "unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8." Accordingly, the test here is whether, on the whole record, there is substantial evidence to support the Commission's findings now in question. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474; *Labor Board*

*v. Pittsburgh S. S. Co.*, 340 U. S. 498; *Baltimore & O. R. Co. v. United States*, 100 F. Supp. 1002, 1006 (S. D. N. Y.).<sup>15</sup>

We recognize, of course, that the Commission is bound to look to the future, see *United States v. Detroit Navigation Co.*, 326 U. S. 236; *New York Cent. R. Co. v. United States*, 99 F. Supp. 394, 404-405 (D. Mass.), affirmed, 342 U. S. 890, since, obviously, one facet of its expertise lies in its ability to make reasonably accurate prognostications of events yet to come. That is true of every specialist within the field of his own specialty. The doctor proceeds on the basis that a particular course of therapy will induce certain reactions in the patient. The lawyer asks particular questions of a witness with an eye to the witness' answers several questions hence. The general plans a campaign with reference to his enemy's capabilities and potential future actions. And the wise judge writes an opinion mindful of the applicability of his language to controversies still distant.

But the judge is not possessed of the doctor's skills, nor the general of those of the lawyer. And while undoubtedly the Interstate Commerce Commission, through long exposure to the problems of the railroads, may be able to make a more accurate and hence more expert assumption as to the effect of one of its orders on the operations of railroads than, let us say, the American Meat Institute, it is not possessed of any specialized competence as to the future intentions of companies engaged in the slaughtering and processing of livestock. The expertise of the Interstate Commerce Commission does not extend to the mental processes of directors of meat-packing plants. As to that, it is restricted to the particular record before it. And in the present case, on the whole record, there is no sub-

<sup>15</sup> The cases just cited demonstrate that, since the effective date of the Administrative Procedure Act, earlier decisions as to the scope of judicial review of orders of the Interstate Commerce Commission are no longer law, and—depending on the point of view—are of only historical, reminiscent, or nostalgic interest.

stantial evidence to show that the other packers in fact contemplate asking for the same kind of sidetrack delivery that Swift is demanding in the present proceeding.

No single packer intervened on Swift's side here, either before the Commission or in the district court. Swift's largest competitor, which some years earlier had intervened as a co-plaintiff in the egress case (*Swift & Co. v. United States*, 316 U. S. 216, 217-218), specifically disclaimed any interest in this case (R. 252). There was not a word of direct testimony from any representative of that or any other meat-packing company as to its course in the event that Swift were ultimately successful. Three hostile witnesses, representing interests admittedly adverse to any system of livestock delivery that would be free from the yardage fees of the Union Stock Yards and the commissions of the middlemen selling animals there, testified to their belief that the other packers would make the same demand for competitive reasons (*supra*, pp. 32-33). But even these witnesses did not undertake to explain how it was that, although Swift for at least thirty-five years has had a sidetrack and unloading facilities directly on the rails of a haul-line carrier at its Omaha Packing Co. plant (R. 265-266, 363, 836), a circumstance which the Commission has characterized in this Court as "the preference in Chicago" (I. C. C. Motion to Affirm, p. 13), not a single one of Swift's competitors in all that period has seen fit to construct or acquire a similar facility. This is the stubborn fact which undercuts all of the Commission's labored rationalizations (R. 75-76) about competitive compulsion.

The Examiner, who saw and observed the witnesses, proposed a report as follows (R. 241):

The assumption that all direct shipments to complainant and to all the other packers in the Chicago district would have to be set out in the Ashland Avenue yards is not warranted on this record. Other packers were represented at the hearing but failed to indicate that they were in any way dissatisfied with the delivery

presently afforded them through the Union Stock Yards or that they would demand private track delivery if such delivery was furnished complainant, or that they had or could provide facilities therefor.

The likelihood that Swift's competitors will join in making similar demands, therefore, is simply a "speculative possibility", as Commissioner Alldredge rightly pointed out (R. 88), and is not supported in this record by that quantum of proof which the law now requires of the finding of an administrative agency.

Thus the assumption on which the operating witnesses rested their dire predictions, the rock on which they built their prophesy of total breakdown, is shown to be without existence in fact. Their conclusions in consequence are no more than what one of them frankly admitted them to be (R. 647), "a clairvoyant adventure." And the Commission's conclusion, which reflected their testimony, is correspondingly without foundation.

**C. The Commission's finding that appellant's shipments of livestock, averaging 18 cars daily, would considerably delay and burden the railroads' operations, is not supported by substantial evidence.**

The Commission found (R. 74-75) that, "Having in mind the congested condition of yards and tracks, it is clear that the attempt to make plant delivery through and over them of even 18 cars of livestock daily would considerably delay and burden defendants' operations." The dissenting Commissioner was of opinion that the limits of the carriers' capacity had not been reached on the basis of Swift's cars alone (R. 88-89). The examiner made no finding at all on that point (R. 230-247), so that obviously nothing turns on factors of credibility. And analysis of the record demonstrates that the Commission's finding, quoted above, does not rest on evidence.

(1) To begin with, more than 1000 loaded cars per day are received in the Chicago Junction's Ashland Avenue

yards (R. 61). Inasmuch as Swift's direct shipments of livestock average less than 20 loaded cars per day (R. 74-75), the Commission is thus finding as a fact that a 2% increase in traffic "would considerably delay and burden defendants' operations." This is an amazing conclusion which necessarily generates disbelief even on its face.

(2) But a first reading can not hope to measure the degree of disbelief which will follow an examination of the undisputed evidence. The record establishes that, in fact, the actual livestock traffic now passing over the rails of the Chicago Junction has been decreasing to such an extent that, if Swift's direct shipments had been added thereto, the total livestock traffic on the Chicago Junction would, for each of the last three years available, still have been substantially less than the total of such traffic for each of the immediately preceding years. In other words, the addition of Swift's direct shipments would not have made up the natural decline in the total of all livestock shipped to the Union Stock Yards by rail.

Here are the indisputable figures from the record:

Year	Swift's Direct Shipments of Livestock in Carloads (Ex. 36, R. 1161)	Decrease from Preceding Year in Carloads of Live- stock to U. S. Y. (Ex. 28, R. 1117; Ex. 46, R. 1846)
1945	5021	12217
1946	4204	18318
1947	6393	11578 <sup>16</sup>

In other words, the Commission in its finding ignores the incontrovertible fact that the decline in rail shipments of livestock would have been more than ample, several times over, to absorb the amount of the additional shipments which Swift was sending to its Omaha plant location during

<sup>16</sup> Livestock shipments to the Union Stock Yards in carloads for the last four calendar years, as shown by the cited exhibits, were as follows:

1944.....	95,674
1945.....	83,457
1946.....	65,139
1947.....	53,561

this period. This fact alone is sufficient to undermine the finding now under consideration.

(3) The switching involved in routing Swift's present direct shipments to the Omaha Packing Co. plant was found by the Commission to be "a minor operation" (R. 69). The operating witnesses had similarly characterized it (R. 641, 651, 663-664, 666). But the Commission went on to find that delivery at the Omaha Packing Co. plant pens was different from delivery at Swift's present sidetrack, saying (R. 78):

The transportation services, conditions, and circumstances connected with deliveries at the Omaha plant pens are substantially dissimilar from those connected with the delivery here sought. There, the unloading chutes are on the rails of a line-haul carrier, outside the stockyard congested area, and the delivery made by that carrier is nothing more than a simple switch, at carrier's ordinary operating convenience and without interruption or interference from connecting line engines, as all of the switching is under the control of and performed by the Burlington.

However, the Commission did not go on to explain how the "minor operation" at the Omaha Packing Co. location, even when transferred to the present sidetrack (which for purposes of argument under this heading we take to be "substantially dissimilar") could assume such proportions that it "could considerably delay and burden defendants' operations." The gap between premise and conclusion—we had more accurately said "yawning gulf"—is assuredly not spanned by the testimony of the operating witnesses. For all of their testimony as to congestion was predicated on the assumption that all of the packers would seek sidetrack delivery of all their direct shipments (*supra*, p. 32). There was not a word of testimony from any of the seven operating witnesses, even in the realm of opinion and conjecture, as to the effect on the Chicago Junction's operations of delivering only Swift's direct shipments to Swift's sidetrack. That subject was simply not explored on the record.

(4) When the Commission came to consider the operating problem involved in making delivery of cars of livestock direct to Swift's sidetrack, it said (R. 74):

Indeed, it appears that in some instances, immediately upon arrival of a consolidated train including cars of livestock for complainant, the Junction might have to make a special run to deliver the cars at the latter's plant.

This was one of the factors relied upon to support the finding now under discussion. But the Commission in thus calling attention to the factor of special runs seems conveniently to have overlooked the large number of similar special runs now being made to the Union Stock Yards, many of which, as it found (R. 64), "are made with but one or two cars per train." Just how many appears from Ex. 45 (R. 1681-1842): During a test period of three weeks, over one third of the total livestock deliveries by rail to the Union Stock Yards were brought there by trains of one and two cars (*supra*, p. 20). But what is usual and regular for deliveries to the Union Stock Yards becomes a most unusual matter when deliveries to this appellant come into question.

It follows from all of the foregoing that the Commission's finding that Swift's shipments alone would result in burdensome congestion lacks the support of substantial evidence. Indeed, the circumstance that the examiner made no finding on the question either way strongly suggests that this "finding" was an afterthought on the part of the Commission, and that it was inserted in the interest of supplying logical consistency, and, perhaps, of adding a modicum of literary grace to the report. But, up to now at any rate, the *elegantia juris* can not do substitute for evidence when the results of the administrative process are subjected to judicial review.

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The result is that both of the subsidiary findings on which the Commission rested its conclusion that the grant-

ing of the non-discriminatory service which Swift sought would result in delays, disruptions, and congestion, are shown to be without foundation on the evidence: The finding that all the other packers would immediately follow Swift rests not on evidence, but on an economic rationalization which ignores an economic fact of 35 years' standing; and the finding that Swift's shipments alone would result in congestion is shown to be a last-minute addition to the Commission's report, unsupported by any substantial evidence whatever.

We do not need, however, to rest our argument on the obvious infirmities of those two subsidiary findings. For present purposes our position is not impaired even if we assume *arguendo* that it is true that Swift's shipments alone will produce congestion, that every other packer, large and small, will immediately "me-too" in the event of Swift's success, and that the combined influx of all direct shipments of livestock now transported to Chicago by rail will in fact produce the congestion and disruption envisaged by the Commission.

Because, after all, the proposition that congestion and disruption may justify discrimination, the view that the practical difficulties incident to compliance will excuse violations of law, amount to no more than the argument of inconvenience. The basic aim of the Interstate Commerce Act, as this Court has iterated and reiterated, is the removal of every species of discrimination. *Shreveport Rate Case*, 234 U. S. 342, 356; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 749-750; *Merchants Warehouse v. United States*, 283 U. S. 501, 512; *Mitchell v. United States*, 313 U. S. 80, 94; *New York v. United States*, 331 U. S. 284, 296; *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, 175. That aim would be but lip-service if the Commission were now to be permitted to grant dispensations from the command of the Act each time that the discrimination complained of were effected in a crowded terminal. There are many busy, crowded, congested terminals in this country—and there will be more congestion rather than less as the

national economy continues to expand. The course of Congressional legislation since 1887 lends no support to the notion that the imperative of the statute has been watered down to "no discrimination except in circumstances of congestion," and the Act in terms makes no exceptions on that ground. The command of the Act is categorical—and has been so read by this Court. Neither inadequacy of facilities (*United States v. Pennsylvania R. Co.*, 266 U. S. 191) nor practical difficulties (*Mitchell v. United States*, 313 U. S. 80) nor conflicting interests of owners of trackage (*United States v. Baltimore & O. R. Co.*, 333 U. S. 169) nor equivalent discrimination caused other groups (*Henderson v. United States*, 339 U. S. 816) can justify a discrimination otherwise forbidden by the Interstate Commerce Act. The Commission can point to nothing which sustains the present ruling other than its own fiat in this case—and that is obviously insufficient.

**IV. THE COMMISSION FAILED TO ALLEVIATE THE CONGESTION ON WHICH IT RELIED TO JUSTIFY THE HIGH ADDITIONAL SWITCHING CHARGE ASSESSED ONLY AGAINST LIVESTOCK DELIVERED TO SIDETRACKS, ALTHOUGH THE COMMISSION WAS AMPLY EMPOWERED TO DO SO, AND ALTHOUGH THAT CONGESTION WAS SHOWN BY THE RECORD TO BE IN SUBSTANTIAL MEASURE DUE TO THE APPELLEES' OWN ACTS RATHER THAN TO THE VOLUME OF LIVESTOCK TRAFFIC.**

**A. The present record proves that, in fact, the congestion on the rails of the Chicago Junction is in substantial measure due to the appellees' own acts rather than to the volume of livestock traffic.**

Department of Agriculture statistics show that in 1947 the Union Stock Yards of Chicago still led all other public markets in the country in total receipts of livestock and in salable receipts of livestock (*i. e.*, excluding direct shipments).<sup>17</sup>

Even so, however, rail shipments of livestock to the Union Stock Yards have vastly decreased in the last quarter of a century. Here are the figures in carloads, showing the percentage of decrease from the high in 1923 (Ex. 46 at R. 1845-1846; Ex. 28, R. 1117):

<sup>17</sup> Ex. 26, not printed. In 1947 Chicago led in total and salable receipts of cattle and in total receipts of hogs; South St. Paul was highest for total and salable receipts of calves; St. Louis National Stock Yards (at East St. Louis) was first in salable receipts of hogs; Fort Worth was highest for salable sheep and lambs; and Denver highest in total sheep and lambs. The following 1947 figures may be of interest:

<i>Public Market</i>	<i>Total Receipts</i>	<i>Salable Receipts</i>
Chicago	6,646,705	4,811,918
Omaha	5,941,166	4,299,166
St. Louis Nat. S. Y.	5,243,683	4,020,680
South St. Paul	5,091,924	4,525,580

Year	Carloads	Decrease since 1923	
		Carloads	Percentage
1923	303,228		
1945	83,457	219,771	72.4%
1946	65,139	238,089	78.5%
1947	53,561 <del>5</del>	249,667	82.3%

It is therefore obvious that the volume of livestock shipments, far from contributing to the congestion on the rails of the Chicago Junction, would, if standing alone, have substantially eliminated it.

The record contains no figures from which the increase in other traffic on the Chicago Junction during the corresponding period, testified to in general terms by some of the witnesses (R. 501, 526, 950), can be accurately measured.<sup>18</sup> But the record does reveal at least five factors, not in any sense attributable to volume of traffic, which contribute materially to the congestion on which the appellees rely to deny delivery of livestock to Swift at the line-haul rate. These factors are:

- (i) Inadequate provision of motive power.
- (ii) Labor agreement which impairs efficiency.
- (iii) Obstructive rules of the Union Stock Yards.
- (iv) Refusal of Chicago Junction to grant trackage rights.
- (v) Virtual anarchy on the Chicago Junction tracks.

<sup>18</sup> In the *Chicago Junction Case*, 71 I. C. C. 631, 633, decided in 1922 on a record presumably reflecting earlier statistics, the Commission said:

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central manufacturing district, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-than-carload freight.

These figures are not comparable with the findings as to the present traffic of about "1,000 loaded cars per day" of non-livestock traffic (R. 61), since tons are not related to carloads. The amount of the Chicago Junction's non-livestock traffic over the years was not developed in the present case.

(i) As was pointed out in the Statement, *supra*, p. 24, there has been a gradual but on the whole steady decrease in the Chicago Junction's motive power since that road was leased by the New York Central. Whereas in 1925, the Chicago Junction had 86 engines, in 1940 it had only 47 (Ex. 58, R. 1963-1965), and of those 47, 11 are of a type that do not lend themselves readily to industrial work (R. 68), while 14 more were received from the U. S. Railway Administration during World War I, more than 30 years ago (R. 525). The Superintendent of the Chicago Junction admitted frankly that the supply of engines was insufficient to take care of all industrial placement (R. 524, 547, 555), and expressed his desire for at least five additional Diesel engines (R. 525-526). Obviously, then, an increase in the Chicago Junction's motive power would appreciably alleviate the existing congestion on its tracks.<sup>19</sup>

(ii) We also pointed out in the Statement, *supra*, pp. 24-25, that whereas prior to 1946, the various line-haul carriers had themselves placed freight cars in the various yards of the Chicago Junction, that road, in order to avert a threatened strike, agreed with its employees that in the future all such traffic would be received at the Ashland Avenue south yard, which has but one running track to the east. Under this arrangement, the Chicago Junction now uses 3800 train crews, each of five men, over and above what it employed previously, but with no increase in the traffic handled (R. 518-519), with the consequence that the crews of the line-haul carriers are delayed awaiting classification of the cars by the Junction (R. 539) and with the further consequence that the sole running track to the Ashland Avenue yard from the east is badly blocked, frequently

<sup>19</sup> In its Motion to Affirm, the Commission said (p. 21) that "The assumption that the use of any number of engines over 47 would slow down deliveries is much more logical it would seem, than that an additional number would facilitate switching and relieve congestion." This notion, that more motive power means less switching service, being directly contradicted by the testimony of the Chicago Junction's Superintendent (R. 525-526), will no doubt be abandoned in the Commission's brief on the merits.

tying up as many as four trains (R. 63). It is therefore plain that the new labor agreement, the existence of which the Commission noted without more (R. 61), makes a substantial contribution to the existing congestion.

(iii) We likewise pointed out in the Statement, *supra*, pp. 26-27, that the rules of the Union Stock Yards forbid the line-haul carriers, which bring cars of livestock directly into the chutes there, from pulling into those chutes trains containing any cars loaded with dead freight; and we pointed out, from the testimony of one of appellees' operating witnesses, Superintendent Heide of the Rock Island, how line-haul operations have been impeded by enforcement of these rules. As Mr. Heide said (R. 668), "I certainly would like to cancel it if I could. It would save me a lot of trouble." Surely here is the most expert type of expert testimony in support of Swift's contention that factors other than the volume of traffic combine to create the congestion relied upon to justify the discrimination assailed in this proceeding.

(iv) We also pointed out in the Statement, *supra*, p. 26, that the line-haul carriers do not now have trackage rights to make direct deliveries of livestock to Swift's sidetrack, and that they had been advised by the Chicago Junction that no trackage rights will be granted for that purpose (R. 840). There is no suggestion in the record that this refusal is predicated on the possibility of further congestion.

(v) Finally, we pointed out in the Statement, *supra*, pp. 25-26, quoting from the Commission's report (R. 64), that the line-haul carriers' crews may and do operate over the Chicago Junction's rails without any limitation as to time or hours, and that an average of 167 foreign crews per day are on those tracks at all hours of the day and night. It is not at all far-fetched to characterize such a method of

operation as virtual anarchy.<sup>20</sup> The only rule which seems to be observed is that, if possible, collisions shall be avoided. Obviously such a state of affairs contributes mightily to the congestion which obtains on the Chicago Junction's rails.

**B. The Commission failed to alleviate the existing congestion although it was amply empowered to do so.**

The Commission had ample power under the law to correct every one of the operating practices above considered which contribute so substantially to causing the congestion on which it relied to justify the discriminatory switching charge here assailed.

(i) *Inadequate provision of motive power.* Sections 1(10) and 1(11) of the Interstate Commerce Act clearly require the Chicago Junction to provide sufficient suitable switching locomotives to effect all necessary switching to private sidetracks on its rails. They provide—

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

<sup>20</sup> "Anarchy" is defined in Webster's *New International Dictionary* as "absence of regulating power in any sphere; confusion or disorder, in general"; and in the *American College Dictionary*, as "a state of society without government or law; \* \* \* confusion in general; disorder."

These provisions have in the past been held by the Commission to require carriers to supply adequate placement of cars on private sidetracks. See *King Stone Co. v. Chicago, I. & L. Ry. Co.*, 160 I. C. C. 245; *Train Service on Northern Pacific*, 112 I. C. C. 191, 194. And, even in the absence of those rulings, the unambiguous provisions of the statute should have impelled the Commission to direct the Chicago Junction to supply the deficiency in switching engines to take care of all the industrial placement of cars, a deficiency which that carrier's Superintendent frankly admitted (R. 524, 525-526).

Moreover, since the Chicago Junction is under lease to the New York Central, so that, by virtue of Section 1(3)(a) of the Act, defining "railroad" as "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease," the Chicago Junction is as a matter of law a part of the New York Central. To rest its decision as the Commission did (R. 68), on the circumstance that "The present motive power of the Junction is being operated to capacity," not only ignores the plain command of Sections 1(10) and 1(11), but likewise ignores the relation of parent and subsidiary, and the circumstance that the amount of motive power available to the Chicago Junction rests in the discretion and control of the New York Central. Thus Section 1(3)(a) of the Act is also brushed aside by the Commission, although that very section was but recently enforced against the same parent carrier by this Court in *United States v. Baltimore & O. R. Co.*, 333 U. S. 169—sustaining the Commission's ruling in *Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55.

On its face, the steady decrease in the Junction's motive power since its lease by the New York Central would seem to reflect the stock pattern of a subsidiary being milked by its parent. The facts are not in dispute; the figures are in writing (Ex. 58, R. 1963-1965), and were produced by counsel for the Central (R. 1036-1037). Yet the Commission

does not mention that decrease at any point in its report, although one of the grounds for approving the New York Central's lease of the Chicago Junction was that it would "insure to the shippers of the Junction \* \* \* the assistance of an interested trunk line in times of car shortage \* \* \*." *Chicago Junction Case*, 71 I. C. C. at 638. The Commission's devotion to the dogma of Railroad Statics, and its apparent blindness to everything but the existing *status quo* of rail operations, is perhaps nowhere more clearly demonstrated.

(ii) *Labor agreement which impairs efficiency.* Similarly, the Commission's report refers to the restrictive labor agreement (R. 61), and stops there.

It is of course true that the Commission as such has no jurisdiction over labor disputes or rail wages or conditions of labor. If a carrier chooses to sign a feather-bedding agreement with a union with consequent impairment of operating efficiency, that concerns primarily the parties and the agencies created by the Railway Labor Act. But if a carrier relies on such an agreement to justify even in part a discrimination otherwise forbidden by the Interstate Commerce Act, then the Commission is directly concerned.<sup>21</sup> It is settled that a business concern can not rely on its agreements with a labor union when charged with a violation of the Sherman Antitrust Law. *Allen Bradley Co. v. Union*, 325 U. S. 797. We think that the rationale of that case is broad enough to condemn reliance by a carrier on an agreement with its labor force when charged with a violation of the Interstate Commerce Act. And we submit, therefore, that the Commission should have held that the existence or non-existence of labor agreements did not

<sup>21</sup> The line-haul carriers have contended that the labor agreement now in question is violative of Condition No. 3 imposed by the Commission, and on that ground sued to enjoin the carrying out of the labor agreement. See *Baltimore & O. R. Co. v. Chicago Junction Ry. Co.*, 156 F. 2d 357 (C. C. A. 7); *Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U. S. 519; *Baltimore & O. R. Co. v. Chicago River & Indiana R. Co.*, 170 F. 2d 654 (C. A. 7).

qualify in the slightest degree the carrier's statutory obligation not to discriminate against a particular commodity or against a particular consignee.

The Commission's treatment of the labor agreement emphasizes, from still another aspect, its disinclination to strike down any discrimination when such action would involve the slightest disturbance of existing arrangements.

(iii) *Obstructive rules of the Union Stock Yards.* The rule of the Union Stock Yards, which prevents even a single car of dead freight from resting on its tracks, is obviously designed to facilitate shipment of livestock to its own chutes and to burden such shipments destined elsewhere—and the rule functions according to plan. The record shows how it impedes rail operation—and the record shows that the Commission, here again, neither noticed nor remedied the obstruction.

Yet there are ample precedents which condemn such practices, and which hold that a portion of track used by a common carrier can not be closed to a particular class of merchandise. Just as the rails can not be closed to livestock (*Louisville & Nashville R. Co. v. United States*, 238 U. S. 1; *Louisville & Nashville R. Co. v. United States*, 242 U. S. 60, 74; *United States v. Baltimore & O. R. Co.*, 333 U. S. 169), so by a parity of reasoning they can not be closed to non-livestock. And the same rule applies regardless of the ownership of the track segment in question, as this Court held but recently in *United States v. Baltimore & O. R. Co.*, *supra*.

But, here again, however, the Commission accepted the existing regulation as inevitable and immutable—and took no step either to strike down the consequent obstruction or to alleviate the resultant congestion.

(iv) *Refusal of Chicago Junction to grant trackage rights.* The refusal of the Chicago Junction to grant trackage rights to the line-haul carriers to deliver livestock to Swift's sidetrack (R. 840), while granting them such rights

to deliver livestock to the chutes of the Union Stock Yards (R. 62) would seem to be a discrimination too obvious for discussion. In the past the Commission has repeatedly ruled that carriers may not, under the cover of trackage arrangements, work unjust discriminations against shippers or localities. *Huerfano Coal Co. v. Colorado & S. E. R. R. Co.*; 41 I. C. C. 657, 659, and rulings there cited; *Benton Coal Mining Co. v. Chicago, B. & Q. R. R. Co.*, 63 I. C. C. 396, 399. And this Court has specifically characterized as "unsound" the contention "that a preference granted certain shippers served by a carrier by virtue of the ownership of tracks or trackage rights over other shippers not reached by the carrier, because it does not own tracks or trackage rights which would enable it to reach them, cannot warrant a finding of undue discrimination \* \* \*." *United States v. Pennsylvania R. Co.*, 266 U. S. 191, 198-199.

Today the Commission has the same legal power to halt discrimination which is rested on an absence of trackage rights that it had then. But in the present case the Commission did not even notice this obvious discrimination, much less strike it down.

(y) *Virtual anarchy on the Chicago Junction tracks.* Of course it is not the function of this Court to run a railroad or to tell a railroad how it should be run. But it is the function of this Court to direct the Commission to observe and comply with the rules of law enacted by Congress to eliminate discrimination. And it is plain that the policy of Congress "to promote safe, adequate, economical, and efficient service" (National Transportation Policy, *infra*, p. 142) has been implemented by adequate grants of power to enable the Commission to correct the chaotic mode of operation which congests the tracks of the Chicago Junction, and under cover of which it practices the discrimination spread at large upon the present record.

The Commission not only has ample power to bring a semblance of order out of the existing chaos, it has in fact taken a whole series of essentially similar corrective actions in the past. We quote some of the instances catalogued by one of the most sympathetic observers of the Commission's work (III-A Sharfman, *The Interstate Commerce Commission* (1935) 57, 59, 60-62, 66):

The Commission's authority over service is now essentially coextensive with its rate-making power even under normal conditions; and in emergency situations it exercises a jurisdiction so sweeping, in the interest of general transportation needs, as virtually to dominate the movement of property by rail and the utilization of its instrumentalities. Nominally, aside from authority to require the joint use of terminals when deemed practicable and in the public interest, the duties of the carriers and the powers of the Commission are restricted to "car service"; but since the term "car service", as employed in the statute, embraces the use, control, supply, movement, distribution, exchange, interchange, and return of all vehicles—including cars, locomotives, and special equipment—and the supply of trains, it is obvious that all physical instrumentalities as well as all important service relationships, between carriers and shippers and amongst the carriers themselves, are thereby subjected to the Commission's jurisdiction. The initiative in furnishing safe and adequate service and in maintaining just and reasonable arrangements rests in the roads; but on complaint or on its own motion, the Commission may, after hearing, prescribe the rules, regulations, and practices that shall govern. In performing this normal regulatory task, however, the Commission has avoided formal proceedings as far as possible. From the beginning, it has achieved its ends very largely through coöperation with the carriers. \* \* \* (p. 57.)

The Commission, in coöperation with the carriers and shippers and their representatives, seeks continuously not only to stimulate improvement in operating efficiency, but "to eliminate misunderstandings and se-

cure the best possible distribution of cars and the freest practicable movement of traffic" [citing *Annual Report*, 1923, p. 54]. (p. 59.)

Merely by way of illustration, among numerous other service difficulties adjusted by the Commission in various parts of the country and with respect to various types of traffic, reference may be made to the relief of the freight congestion in Florida, to the development of a car-distribution plan for the movement of grapes from California, to the removal of congestion of the Belt Railway of Chicago [citing *Annual Report*, 1927, p. 38] and at the port of Houston, to the adjustment of differences with regard to the handling of livestock [citing, *inter alia*, *Annual Report*, 1929, pp. 47-48], the weighing of vegetables, and demurrage and storage. Through such activity in matters of car service, the Commission is removing maladjustments and promoting movement of traffic; composing service differences and facilitating efficiency and economy of operation. (pp. 60-62.)

In sum, then, the Commission is asserting a large measure of affirmative control over railroad facilities and transportation service, both under normal conditions and in emergencies, not only by maintaining equitable relationships between carriers and shippers and as amongst the carriers themselves, but by promoting efficiency of operation and the free movement of traffic. (p. 66.)

No adequate legal reason is apparent on the face of the Commission's report—or elsewhere—why the Commission could not have taken like action in the present case "to promote . . . efficient service" (see National Transportation Policy), in the crowded yards of the Chicago Junction, with a view to alleviating the congestion there.

In fact, however, not only has the Commission not instituted corrective action, it has relied on the anarchic conditions obtaining on the rails of the Chicago Junction to justify the continuation of the discrimination involved in

this case. For, in differentiating the switching service now accorded Swift in respect of its direct shipments of livestock at the Omaha location, which is rendered at the flat line-haul rate, from the switching service at Swift's plant sidetrack, which now carries the high additional charge of \$39.24 per car, the Commission says (R. 78):

The transportation services, conditions, and circumstances connected with deliveries at the Omaha plant pens are substantially dissimilar from those connected with the delivery here sought. There, the unloading chutes are on the rails of a line-haul carrier, outside the stockyard congested area, and the delivery made by that carrier is nothing more than a simple switch, at carrier's ordinary operating convenience and without interruption or interference from connecting line engines, as all of the switching is under the control of and performed by the Burlington.

Thus inequality is defended and perpetuated by invoking and exalting anarchy. Devotion to the dogma of Railroad Statics could hardly be carried further.

**V. BOTH THE HIGH ADDITIONAL SWITCHING CHARGE ASSESSED ONLY AGAINST LIVESTOCK DELIVERED TO SIDETRACKS, AND THE CONGESTION ON WHICH THE COMMISSION RELIES TO JUSTIFY THAT CHARGE, REST ON AND ARE PERPETUATED BY A DISCRIMINATORY AND ILLEGAL COVENANT, STILL IN FORCE AND STILL GIVEN EFFECT BY THE PARTIES THERETO, WHEREBY THE NEW YORK CENTRAL AGREES TO OPERATE THE CHICAGO JUNCTION FOR "THE BENEFIT, ADVANTAGE, AND BEHOOF OF THE BUSINESS AND AFFAIRS" OF THE UNION STOCK YARDS.**

We come now to the heart of the case, to the covenant whereby the New York Central agrees to operate the Chicago Junction for "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards, which the latter company invoked to require the appellee New York Central to defend Swift's complaint before the Commission, upon pain of terminating that carrier's lease of the Chicago Junction (Ex. 57, R. 1961-1962). We propose to demonstrate, first, that this covenant is illegal on its face, and, next, that, as the present record shows, that covenant still enables the Union Stock Yards to exercise a substantial measure of control over the operations of the Chicago Junction. We next go on to show that, by reason of this covenant, the Chicago Junction and its parent carrier, the New York Central, not only have no incentive to correct the operating practices which contribute to the congestion, but on the contrary are necessarily forced to continue the existing congestion—which, as this record shows, operates in favor of the Union Stock Yards and against shippers who desire to receive livestock at their own sidings. Thus the covenant is not simply an agreement *in vacuo*, it is an undertaking fully implemented which operates as an effective combination in restraint of trade. Therefore the Commission is in fact, despite its protestations to the con-

trary, enforcing a discriminatory covenant which perpetuates the congestion on which alone rests the justification for the switching charge herein assailed. And of course neither the covenant, nor the congestion, nor the discrimination attain to legitimacy simply because the present practices have been long continued.

**A. The covenant in the lease of the Chicago Junction, which requires the appellee New York Central to operate the Chicago Junction for "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards, is illegal on its face.**

We turn for the text of the covenant in question to the communication of the party invoking it (Ex. 57, R. 1961-1962), viz.:

In Article VI of the lease from the Yard Company to Chicago Junction Railway Company dated December 1, 1913, the Junction agreed "to conduct, manage, and operate the line of railroad by this instrument demised, and in so far as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards." In the lease of May 19, 1922, by the Junction to the River Road (see Art. III, Sec. 2, and Art. IX), the River Road and the New York Central undertook to perform the above-quoted covenant of the Junction in the earlier lease.

This is, on its face, a covenant to favor a particular patron of the leased road. It is, therefore, a covenant to discriminate, and as such it is illegal on its face. It is condemned by Sections 1(5), 1(9), 2 and 3(1) of the Interstate Commerce Act. It is also condemned—to cite only a single instance—by *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, which likewise dealt with a carrier's discrimination against a shipper which, as here, was rested on a covenant to discriminate, made between the carrier and the owner of a portion of its track. In that case, the

New York Central agreed with the Cleveland Stock Yards to make a separate charge for "competitive traffic" passing over Track 1619; here the New York Central has agreed with the Union Stock Yard and Transit Company of Chicago to operate the Chicago Junction for "the benefit, advantage, and behoof of the business and affairs of the Yards." In the Cleveland case, the "competitive traffic" at which the covenant was directed was admitted to be livestock; here "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards requires that all direct shipments of livestock be discouraged, because—and we quote from the letter written by counsel for the Union Stock Yards (Ex. 57, R. 1961)—

If the request of Swift is granted, and the other packers demand and are accorded similar treatment (which may be anticipated), the effect will be substantially to destroy the business of the Yard Company.

That is to say, if Swift and the other packers succeed in obtaining livestock delivered at their own sidetracks on the Junction rails, so that they are no longer required, in respect of their direct shipments, to pay yardage fees to the Union Stock Yards for non-transportation services, the Union Stock Yards' business will be substantially destroyed. If Swift alone succeeds, the Union Stock Yards' business will not be impaired, because Swift's direct shipments are now consigned, not to the Union Stock Yards, but to Swift's ~~Omaha~~ Omaha Packing Co. plant on the Burlington. None the less, to the extent that the Chicago Junction and its lessee succeed in preventing sidetrack delivery of direct shipments of livestock to any consignee, they will in most instances be funnelling such traffic into the chutes of the Union Stock Yards, subjecting it to yardage fees, exacted for services inappropriate to and unnecessary for direct shipments, see pp. 12-13 *supra*, and consequently not desired—and such conduct will comport squarely with the New

York Central's covenant "to conduct, manage, and operate" the Chicago Junction "in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards."

Right there is the focal point—and the source—of the discrimination which infects this entire controversy.

It was argued in the District Court, on behalf of the Commission and the United States, that the clause in the covenant, "in so far as possible", must be construed to mean "in so far as it is legally possible", on the principle that, where two constructions of a written contract are possible, preference will be given to the one which does not result in a violation of law, citing *Great Northern Ry. Co. v. Delmar Co.*, 283 U. S. 686, 691.

Several answers to this too facile approach come readily to mind. One is that made by Commissioner All-dredge below (R. 85):

The illegality of this covenant is not, as was contended on oral argument, self-corrective through the operation of the qualifying phrase "insofar as possible." The daily conduct of a common carrier's business cannot be supervised by governmental authority so as to safeguard the public interest against the observance of such a covenant, whether qualified as indicated or left entirely unqualified. Its effects may be subtle and indirect and their impact may be felt by shippers located hundreds of miles from the locale of the carrier's operations and who could not, for this reason, be expected to trace the source of their difficulties. A covenant of this character is so diametrically opposed to the public duties and obligations of a common carrier that no vestige of it should be allowed to remain. It is unlawful per se.

Another answer is that, if the covenant is construed in the manner suggested by the Government and the Commission below, it would be meaningless. An agreement to effect a preference to the extent that a preference is legally possible, as applied to matter and activities subject to the

Interstate Commerce Act, is a contradiction in terms; there are no lawful preferences, there are no lawful discriminations, within that field. The covenant in question is either illegal or nugatory—and this record is replete with proof that the parties thereto did not regard it as being without meaning or effect.

**B. The present record proves indisputably that, by virtue of the covenant in the lease of the Chicago Junction property, the Union Stock Yards still exercise a substantial measure of control over the operations by the New York Central of the Chicago Junction.**

In its report, the Commission asserted that the Union Stock Yards were completely divested of all control over the terminal railroad once it was leased, saying (R. 80),

The effect of the leases was to completely divest the Union Stock Yards of operation and control of the terminal railroad, the Court saying [in *Union Stock Yard Co. v. United States*, 308 U. S. 213, 216-217] that by ceasing to operate or control its railroad directly or indirectly, the Union Stock Yards restricted its transportation service to the loading or unloading of live-stock as specified in its tariff.

And the Commission in this Court (I. C. C. Motion to Affirm, pp. 17-18) repeats the assertion of complete divestiture of control.

The record, however, completely undermines the Commission's position on this point; and, as the evidence is in documentary form, it is not subject to dispute.<sup>22</sup> The letter

<sup>22</sup> On behalf of The Chicago Live Stock Exchange and Chicago Traders Live Stock Exchange, intervening appellees, there was offered a deposition by Guy L. Gladson, Esq., a member of the firm of Winston, Strawn & Shaw, and one of the writers of Exhibit 57 (R. 1961-1962). This deposition, not having been before the Commission, was excluded by the District Court (R. 149).

(a) Such exclusion was plainly right; a long line of cases holds that, when administrative orders are attacked in the courts, evidence which was not before the administrative agency may not be received. *National Broadcasting Co. v. United States*, 319 U. S. 190; *Shields v. Utah Idaho R. Co.*, 305 U. S.

already referred to (Ex. 57, R. 1961-1962), which invoked the covenant to induce action on the part of the New York Central contrary to that which that carrier had originally contemplated, did not restrict itself to abstract expression of opinion. It was not a mere suggestion. It was a threat, clearly, unequivocally, and precisely phrased in lawyers' language. Counsel for the Union Stock Yards wrote (Ex. 57 at R. 1962),

It is our considered opinion that the River Road and the Central are obligated under the terms of the foregoing provision of the lease of 1913 to defend this case and to take every other step appropriate to prevent irreparable injury to the Yard Company, and that any failure to do so will be a breach of this covenant of the lease.

This was intended to mean, and meant, "If the New York Central will not act for the benefit, advantage, and behoof of the business and affairs of the Stock Yards by defending Swift's complaint before the Commission, their lease of the Chicago Junction, approval of which entailed so much litigation,<sup>23</sup> will be terminated, and we will thereupon

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177; *Acker v. United States*, 298 U. S. 426; *Tagg Bros. v. United States*, 280 U. S. 420; *United States v. Louisville & N. R. Co.*, 235 U. S. 314. The only exceptions—instances of alleged confiscation (*Baltimore & O. R. Co. v. United States*, 298 U. S. 349), and situations where the jurisdiction of the administrative agency is challenged (*United States v. Idaho*, 298 U. S. 105)—are not involved in the present case on any footing.

(b) Moreover, Mr. Gladson did not deny writing the letter, but only sought to explain the circumstances that led to its being written (R. 141-144); his deposition, even if admissible, would therefore amount to no more than confession without avoidance.

(c) And finally, counsel for the appellant was prepared, had the deposition been admitted, to rebut Mr. Gladson's testimony. See the following excerpts from pp. 27 and 40 of the proceedings of February 27, 1951 (Designated (R. 221, item 6) but not printed, R. 226, see item II D): Mr. Rynier: " \* \* \* we are prepared at this session this morning, to rebut the testimony offered by Mr. Gladson in that deposition." \* \* \* "I don't want to conclude without again reminding you that we would desire to rebut this evidence, if it is admitted."

<sup>23</sup> See note 9, page 23, *supra*.

lease this valuable property to one of the New York Central's competitors."

Whereupon the New York Central proceeded to defend Swift's complaint before the Commission (R. 250), and, thereafter, to defend Swift's complaint against the Commission in the District Court (R. 97-124). Nor was this the only step that the New York Central took lest it be considered to have broken its covenant to operate and manage the Chicago Junction for the "benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards.

After the date of the letter in question, the Chicago Junction filed a new tariff, under which it proposed "to specifically exempt livestock from the traffic which it will transport and to cancel the application on livestock of all switching charges published by it, except to and from chutes and sidings at the Union Stock Yards" (R. 59). The earlier arrangement had long been in effect, but, obviously, if it were cancelled, so that livestock could not be delivered at all at the sidetrack of Swift or any other packer on the Junction tracks, even with the high additional switching charge, then the business and affairs of the Union Stock Yards would be correspondingly benefited and advantaged. Whatever else the New York Central might be charged with, whatever provisions of the Interstate Commerce Act it might be violating, it was determined not to breach its covenant to manage and operate the Chicago Junction for the "benefit, advantage, and behoof" of the Union Stock Yards.

For the Commission to assert, therefore, in the face of this uncontroverted—and incontrovertible—evidence, that the Union Stock Yards have been completely divested of control over the Chicago Junction, is on a par with asserting that black is white, war is peace, and slavery is freedom.

Actually, of course, the vice of the covenant goes far deeper than the two instances of patent control just dissected. Neither of those involved a continuing wrong. In

the first instance noted, as it happened, the new tariff was cancelled (R. 81); and of the second it is doubtless sufficient to say that the litigation in question has not yet finally terminated in the Union Stock Yards' favor. The truly dangerous feature of the covenant, the feature which makes it a continuing wrong, is that it can always be invoked whenever the Union Stock Yards feel that their business is falling off, upon pain of cancellation of the lease, and that it thus is a means of insuring inefficiency whenever inefficiency is necessary to protect that business. And, in fact, as we shall now show, that is precisely what has happened in the past and what is happening right now.

As we showed at length in Point IV, *supra*, pp. 105-109, the congestion on which the Commission relied to justify the discrimination here practiced is in substantial measure the result, not of mere volume of traffic, but of the several appellees' own acts. And, in view of the covenant, of the undertaking which the Union Stock Yards does not hesitate to seek to enforce, there is not only no incentive for the Chicago Junction and the New York Central to improve matters, but, on the contrary, these carriers have every inducement to continue the present inefficient and wasteful practices so that the congestion continues—with the consequence that sidetrack delivery (which produces no revenue for the Union Stock Yards) is denied; and with the further and ultimate consequence that the business of the Union Stock Yards will be benefited and advantaged rather than substantially destroyed.

**C. The present record demonstrates that the illegal covenant continues and perpetuates the existing congestion, which is the sole factor relied upon by the Commission to justify the discriminatory switching charge.**

The New York Central's covenant "to operate and manage" the Chicago Junction "for the benefit, advantage, and behoof of the business and affairs of the Yards," shown here to be invoked under pain of cancellation of its valuable

lease, and the actual management and operation of the Chicago Junction, as disclosed in the present record, shed mutual illumination upon each other. When the covenant and the operating practices are viewed together, as they must be, the covenant is seen for what it is, not simply an abstract generalization, but the linchpin of an effective combination in restraint of trade; and the operating practices are revealed, not as fortuitous, Topsy-like developments, but as a closely knit, interlocking arrangement which effectively precludes any deliveries of livestock other than deliveries funnelled into the chutes of the Union Stock Yards (in respect of which the Yards can and does assess yardage fees, whether or not the shipments in fact require the services for which those fees are exacted).

It is clear that the New York Central, lessor of the Chicago Junction, is under no incentive either to dissipate the congestion or to improve operating conditions; and that assertion rests, not on conjecture, but on the present record.

The Chicago Junction's superintendent testified that his road's track layout at the time of the hearing before the examiner was the same as in 1909, that no new tracks had been added in the intervening nearly 40 years (R. 461, 523). And the Commission found (R. 60) that "There is no land available for the expansion of those [Ashland Avenue] yards or the building of additional facilities nearby for interchange and classification of traffic."

Yet in 1922, when the Commission was passing on the propriety of the New York Central's proposed lease of the Chicago Junction, one of the grounds underlying its approval was the possibility of linking the Chicago Junction's facilities with those of the New York Central's wholly-owned subsidiary, the Indiana Harbor Belt Railroad. At that time the Commission said (*Chicago Junction Case*, 71 I. C. C. 631, 634-635, 638):

The Junction properties are incapable of expansion so as to afford adequate facilities for interchange and

classification, since the district in which they lie is highly developed and intensively used, whereas the Harbor Belt has or can acquire additional space for the building of yards. The inner and outer properties are therefore complementary and in no sense competitive, but can only be operated to the best advantage by bringing them under common control. This expansion at outlying points would permit the inner group to extend further its team-track facilities and enable a more expeditious use of the less-than-carload facilities of the stockyards group. The gain to shippers on the Junction would be found in the greater accessibility of the outer-belt facilities of the Harbor Belt and the expansion of inner facilities made possible by the removal of outer-belt facilities from the inner district. Inbound traffic, for example, would be brought first to outer classification yards on the Harbor Belt and there made up into trains for the 12 districts served by the inner lines. Other services now performed by the Junction in the congested area would be performed on the outer belt, to the great relief of the present Junction facilities.

\*\*\* The Central's terminal facilities are relatively inadequate as compared with competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another.

It is clear from the record in this case that the New York Central did not avail itself of the advantages pointed out by the Commission in 1922; and the answer why it did not

do so is to be found in the covenant. For, bound as it is under threat of losing the Junction lease to operate the Junction "for the benefit, advantage, and behoof of the business and affairs of the Yards," the Central has every incentive to leave matters just where they are, to continue the existing slapdash methods of operation, and to perpetuate the existing congestion. Because, to the extent that the yards of the Chicago Junction remain congested, there exists under the ruling of the Commission justification for the discriminatory switching charge on livestock, and for denying Swift's request; and we have it from the Union Stock Yards' counsel (Ex. 57, R. 1961) that "If the request of Swift is granted, and the other packers demand and are accorded similar treatment \* \* \* the effect will be substantially to destroy the business of the Yard Company."

Here, in a nutshell, is the Q. E. D. for the proposition that the covenant is illegal; here is the fully spelled-out chain of reasoning supporting Commissioner Alldredge's acute observation (R. 83):

It is difficult to escape the conclusion that the pecuniary interest of the owners of the stockyards in these terminal facilities has been permitted to work itself out in such manner as to deprive Swift of a service to which it would ordinarily be entitled. The conduct, management, and operation of these facilities so as to assure a direct and uninterrupted movement of livestock, under trackage contracts, to and from the stockyards and to exact a substantial switching charge for the transportation of livestock to any industry not using the services of the stockyards seems to me to comport squarely with the covenant of the lease to "conduct, manage, and operate the line of railroad \* \* \* in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the yards." This, however, is clearly inconsistent with the responsibility of a common carrier to serve all patrons indiscriminately within the limits of its capacity.

It is not necessary at this juncture to analyze the anti-trust precedents relating to railroads in order to ascertain

the full extent to which they fit the present facts. For it is clear that, since the present combination touches matters under the jurisdiction of the Interstate Commerce Commission, Section 16 of the Clayton Act (15 U. S. C. 26) prohibits an immediate action under the antitrust laws by the appellant against any of the present appellees. *Central Transfer Co. v. Terminal R. R.*, 288 U. S. 469. Indeed, even after relief should be had in the present proceeding, a treble-damage action under the antitrust laws would lie only if the "Discriminatory privileges and payments given by a carrier to a consignor or consignee" are "the symptoms or incidents of an enveloping conspiracy with its own illegal ends." *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U. S. 500, 511; *id.* at 515-516. We need not explore these intriguing by-ways further at this time; sufficient to each case is the discrimination thereof. It is enough for present purposes that the covenant in question, and the combination which it links together, result in a violation of the Interstate Commerce Act.

**D. Despite its protestations to the contrary, the Commission in its ruling is, in fact, enforcing the illegal covenant between the Union Stock Yards and the New York Central to the detriment of the present appellant.**

In its report, as has been indicated, the Commission asserted (R. 80) that "The effect of the leases was to completely divest the Union Stock Yards of operation and control of the terminal railroad," and further—

The operation of the Chicago Junction is subject not only to the provisions of the Interstate Commerce Act but also to the conditions imposed by the Commission in the *Chicago Junction Case* [71 I. C. C. 631]. Those conditions were particularly intended to insure that the Chicago Junction and the Chicago River & Indiana should be operated as neutral terminal carriers, without special advantage favoring the New York Central but the conditions were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards.

In this Court, the Commission repeated the substance of the foregoing (I. C. C. Motion to Affirm, pp. 17-18), and also specifically said (*id.*, p. 17) that "Neither the Commission's order nor the decision of the [District] Court was based in any respect on the questioned covenant, and while it was in effect refusing to recognize by failing to give any effect to the covenant, the Commission expressly held that the operation of the Junction was subject to the conditions imposed by the Commission itself and the Interstate Commerce Act."

The intervening appellees, after referring to the portions of the Commission's report above noted, say of the covenant (Motion to Affirm, p. 9), that "It has no relation to the reasonableness or lawfulness of the published charges."

In view of what the present record reveals it is of course apparent that the quoted comments reflect either an almost incredible naivete, or else a complete disregard of facts.

We have already, *supra*, pp. 121-124, pointed out the demonstrable fallacy of the Commission's view that, after their lease of the Chicago Junction, the Union Stock Yards were completely divested of all further control of that road. The Yards' threatening letter to the lessee New York Central, the action taken by the New York Central in consequence thereof with respect to defending the present proceeding, and the further action taken by the Chicago Junction to cancel its switching tariff on livestock destined anywhere than to the Union Stock Yards, combine to establish conclusively the control which the Union Stock Yards can and does exercise whenever its business is threatened. It speaks volumes for the Commission's attitude towards and perception of the facts that the Union Stock Yards' letter, the authenticity of which is unquestioned,<sup>24</sup> is not even mentioned in its report, and that the Commission accordingly

<sup>24</sup> The accuracy of the exhibit was conceded at the hearing (R. 1038) and is admitted by the pleadings (Par. VIII of railroad interveners' answer, R. 102-103; Par. 9 of Union Stock Yards' answer, R. 128; amended answer of Chicago Live Stock Exch. et al., R. 133).

did not perceive the obvious connection between that letter and the subsequent cancellation of the switching charge, which became the subject of the I. & S. proceeding.

The clause in the Commission's report which says of the conditions imposed in the *Chicago Junction Case* (71 I. C. C. at 639-641) that they (R. 80)—

were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards—

can only have reference, among all of the 17 conditions imposed, to No. 9, as follows (71 I. C. C. at 640):

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting-line switching charges than that which prevails in the Chicago switching district generally for the same or similar service under substantially similar conditions.

We are not prepared to disagree with the Commission's conclusion (R. 80) that the quoted condition was and is "broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards." But on the basis of the present record we do assert with confidence that the quoted condition, far from being enforced, is wholly nullified by the Commission's action in the present case. For, under the ruling now being reviewed, the Chicago Junction is, with the sanction of the Commission and of the court below, managed and operated so as to assure a direct and uninterrupted movement of livestock to and from the Union Stock Yards under trackage contracts, with consequent benefit and advantage to the business and affairs of the Yards by reason of the yardage fees assessed on livestock so delivered, while at the same time the Chicago Junction is permitted to exact a high additional switching charge for the transportation

of livestock to any consignee on its rails not using the services of the Union Stock Yards.

No other conclusion is fairly possible when it is remembered that trackage rights are granted the line-haul carriers for delivery of livestock to the Union Stock Yards and denied the line-haul carriers for delivery of livestock to private sidetracks; that the rules of the Union Stock Yards forbidding cars with dead freight on its tracks combine with the labor agreement consented to by the Chicago Junction to render more difficult the ultimate delivery of all freight to private sidetracks on the Chicago Junction's rails; that the dwindling motive power of the Junction has impaired that carrier's ability to make prompt industrial deliveries; that the anarchic passage of foreign crews over the Chicago Junction's rails contributes its part to the congestion and blockage there; and that the congestion resulting from all of these factors is relied upon by the Commission to justify the high additional switching charge on livestock consigned to private sidetracks.

The consequence of the Commission's ruling is that it forces delivery of livestock into the Union Stock Yards, which are thereupon free to assess yardage fees for stockyards services to direct shipments, for which shipments such services are neither appropriate nor necessary nor desired; and, since those services are performed after transportation has ended, the Commission is without power to regulate them. *Swift & Co. v. United States*, 316 U. S. 216. This funnelling the Commission cloaks under the euphemism of the supposed interest in "expeditious centralized delivery" (R. 71). Apart from the point that the Act recognizes no such interest, but on the contrary protects the consignees' right to expeditious *decentralized* delivery, Section 1(9); see p. 83, *supra*, the Commission's concern for the business of the Union Stock Yards is such that where one consignee of livestock—the present appellant—has succeeded in acquiring a sidetrack on the rails of a line-haul carrier, where it can receive its direct shipments

free from the imposition of yardage fees for unwanted services, the Commission characterizes that circumstance as a "preference" (I. C. C. Motion to Affirm, p. 13).

It will not be necessary to repeat here what has already been said above, pp. 109-116, as to the Commission's failure to deal with, or indeed even to recognize, the factors attributable to the appellees which contribute to the congestion, nor to reiterate, what is indeed implicit in the Commission's report, that in its view the discriminatory switching charge is justified and legalized by the congestion.

The sum of the present arguments, without repeating those factors, is that, however much the Commission may have minimized the covenant in its report, its ruling in fact enforces it, perpetuates the congestion, and in consequence perpetuates the discriminatory switching charge which that congestion was held to justify. It is no answer for the Commission now to say (I. C. C. Motion to Affirm, p. 17) that the Commission's order was not "based in any respect on the questioned covenant", or that the Commission refused to recognize the covenant by failing to give any effect to it; such a contention only underscores that body's utter failure to perceive the operation and effect and essential vice of that agreement. Indeed, it is a striking commentary on the insensitivity of the Commission to such an obvious discriminatory restraint that only one out of the eight Commissioners who considered the present case had sufficient perception to appreciate the true relationship of the covenant here in question to the discrimination of which this appellant complained.

It is undisputed and indisputable that the covenant whereby the New York Central agrees to operate and manage the Chicago Junction for "the advantage, benefit, and behoof of the business and affairs" of the Union Stock Yards is still in existence; that this covenant was invoked by the Union Stock Yards after Swift filed its present complaint with the Commission, under threat of cancelling the New York Central's lease of the Chicago Junction; and that the New York Central and its subsidiary thereupon

took steps which they would not otherwise have taken, and which operated to the detriment of this appellant and to the benefit and advantage of the business and affairs of the Union Stock Yards.

It can not fairly be disputed that this same covenant will be similarly invoked in the future, and that under the Commission's ruling below, which finds nothing improper therein, the New York Central will be under strong compulsion to comply with its terms in order to preserve its own valuable interest in the Chicago Junction property. Nor can it fairly be disputed that, while the covenant remains in force with the Commission's approval, it removes every incentive which might otherwise impel the New York Central to improve operating conditions on the Chicago Junction tracks. For to the extent that such improvements are effected and congestion is lessened, sidetrack delivery of livestock will be facilitated; but when that happy upland of optimum efficiency is attained, then, according to the Union Stock Yards, their own business will be substantially destroyed. They would thereupon, necessarily, once more invoke the covenant, and the vicious circle would thereby start on still another round. Actually, however, not only is there no incentive to improvement, but our analysis of the factors contributing to the congestion shows how the covenant is in fact the common and vitalizing element of an effective combination to restrain trade with the appellant at its sidetrack, to its detriment, but for the benefit, advantage, and behoof of the Union Stock Yard and Transit Co. at the latter's yards a few city blocks distant. For to the extent that sidetrack delivery of livestock is prevented, or rendered difficult, or made more expensive, the livestock is inevitably diverted to the chutes of the Union Stock Yards, where it is subjected to yardage fees which the Commission can not regulate and which are exacted for services wholly inappropriate to and unnecessary for direct shipments and in consequence not desired by the consignee.

The consequence is that the covenant perpetuates the existing congestion, which in turn is the foundation on

which the legality of the otherwise discriminatory switching charge is bottomed. As long as that charge remains in effect, livestock is forced into the Union Stock Yards, to the benefit, advantage, and behoof of that company's business, and can not be delivered at private sidetracks because of the prohibitive penalty involved in the present additional switching charge of \$39.24 per car.

That is why appellant asserts that the Commission's ruling has the effect of enforcing the covenant in question.

**E. Neither the fact that the present system of delivering livestock at Chicago has long been in effect nor the circumstance that appellant had a financial interest in the Union Stock Yards prior to 1920 precludes it from obtaining appropriate relief in this proceeding.**

The Commission's report throughout places heavy emphasis on the circumstance that delivery of livestock at Chicago to the chutes of the Union Stock Yards has long been in effect, and that the railway network in the Packing-town portion of that city has developed around that method of delivery. See R. 72-74. But an unbroken line of decisions here establishes that the circumstance that a particular practice has been long continued does not insulate it against change if in fact or in law such a practice is later held to violate the terms of the Interstate Commerce Act. *Merchants Warehouse Co. v. United States*, 283 U. S. 501; *Louisville & N. R. Co. v. United States*, 282 U. S. 740; *American Express Co. v. United States*, 212 U. S. 522. It makes no difference whether the challenged practice is rested on contract (*Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U. S. 603; *Los Angeles Switching Case*, 234 U. S. 294; *United States v. Baltimore & O. R. Co.*, 333 U. S. 169), even on contract made for peculiarly worthy and long antecedent consideration (*Louisville & N. R. Co. v. Mottley*, 219 U. S. 467); or whether the practice rests on long continued and unquestioned custom (*Louisville & N. R. Co. v. United States*, 282 U. S. 740; *American Express Co.*

v. *United States*, 212 U. S. 522) or even on earlier and different rulings of the Commission (*Merchants Warehouse Co. v. United States*, 283 U. S. 501). All these are false foundations for a practice where adherence to the statute calls for its suppression. Cf. *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U. S. 500, 507. There is no estoppel against the assertion of rights under the Interstate Commerce Act. *Los Angeles Switching Case*, 234 U. S. 294, 312-313.

Thus the course of decision in this Court cuts the ground off from under still another justification advanced by the Commission to support its ruling in this case, the fact of long continued practice. Nor does the circumstance that correction of the long-standing discriminatory practice may be difficult operate as a valid reason against such corrective action. *Interstate Commerce Comm. v. Mechling*, 330 U. S. 567. As the Court there said (330 U. S. at 579-580):

Related to the question just discussed, is the Commission's contention here that permitting reshipping rates for ex-barge grain to remain equal to the rates for ex-rail and ex-lake grain will cause "incurable chaos" in and disrupt the national rail rate structure which reflects many interrelated conditions governing the transportation of grain from west of Chicago to eastern markets. \* \* \* The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress.

So here: The possibility of disrupting conditions of terminal operation does not remotely justify the discrimination which deprives this appellant of rights under Sections 1(9) and 2 and 3(1) of the Interstate Commerce Act which have been guaranteed by Congress.

Here again, the philosophy of Railroad Statics must yield to the primary Congressional purpose of removing inequalities and preferences. Discrimination does not attain legitimacy through prescription.

It is contended, particularly by the intervening appellees (Motion to Affirm, pp. 3-4, n.2) that it was the packers, including Swift, who contributed to the existence of the present physical arrangement, quoting a sentence from this Court's opinion in *Swift & Co. v. United States*, 316 U. S. 216, 230: "It was the packers themselves who suppressed the competitive yards and alternative facilities for unloading their stock."

The history of livestock deliveries in Chicago, including the development of the Union Stock Yards, has been commented on at length in at least four opinions of this Court. *United States v. Union Stock Yard*, 226 U. S. 286, 296-301; *Adams v. Mills*, 286 U. S. 397, 410-414; *Union Stock Yard Co. v. United States*, 308 U. S. 213, 215-216; *Swift & Co. v. United States*, 316 U. S. 216, 227-231. But no opinion of this Court has yet considered the significant and far-reaching change which was effected in the Chicago stockyards problem by the antitrust decree entered against, *inter alia*, this appellant, which required Swift to divest itself of all its financial interests and stock holdings in all public stockyards. See par. "Second" of Sub-Ex. 62 of Ex. 42, R. 1458, 1460.<sup>25</sup> By reason of this decree, which required all the packers to convey their stockyards holdings to trustees for an ultimate disposition which was necessarily long delayed (see Sub-Exs. 74-78 of Ex. 42, R. 1611-1637), the situation at Chicago and elsewhere was completely altered. Swift's interests no longer coincided with those of any stockyards. At Cleveland, for instance, the Cleveland Stock Yards began to assess yardage fees on all livestock passing over its tracks to Swift's Cleveland plant at about the time that the Stock Yards securities were sold to outsiders. *United States v. Baltimore & O. R. Co.*, 333 U. S. 169; see R. 34, No. 223, Oct. T. 1947. At Chicago, in the words of one witness (R. 738), Swift became "a competitor that originally was one of our partners." The result exemplifies

<sup>25</sup> Swift made a determined but eventually completely unsuccessful attempt to set aside certain terms of the decree in question. See *Swift & Co. v. United States*, 276 U. S. 311; *United States v. Swift & Co.*, 286 U. S. 106.

what this Court, speaking through Mr. Justice Brandeis, predicted over thirty years ago: "Transportation conditions are not static; the oppressor of today may tomorrow be the oppressed." *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 568. And the consequence has been "a long struggle involving the meat packers, the railroads, and the Union Stock Yard and Transit Company of Chicago," see *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, of which the present case is the latest episode.

If, therefore, the fact of Swift's pre-1920 participation in the development of livestock delivery in Chicago, and in the rise of the Union Stock Yards, is at all relevant in the present connection, it must be on some basis, not yet completely articulated in detail, of estoppel.

To the extent that the argument of any of the appellees rests upon estoppel, formal or otherwise, it is of course untenable. *Los Angeles Switching Case*, 234 U. S. 294. To the extent that the argument in favor of the *status quo* falls short of setting up an estoppel, it is if possible even less tenable. In the court below, see R. R. Brief, pp. 56-57, the railroad appellees said of the voluminous documents embraced in Exhibit 42 (R. 1174-1638) that they

evidence a course of conduct by the packers extending over a period of many years, which was largely responsible for the physical facilities which now make Swift's demands extremely unreasonable and physically impossible.

*This material is not offered to establish any technical estoppel against the packers. It is offered to show that through a long period of years, and until very recently, the packers believed that the delivery of livestock in the public yards constituted the reasonable and lawful method of delivering livestock in the stockyards area. Its primary purpose is to show that the packers not only acquiesced, but actively participated in a particular development of this industrial area and of the structure of the railroad plant which serves it, with the result that under the existing physical conditions the customary method of making delivery to the stockyards has become the only reasonable and practi-*

cal method of making delivery within the stockyards area. [Italics in original.]

This argument involves a number of obvious infirmities. For one thing, it completely (though conveniently) overlooks the many factors other than the volume of traffic which contribute to the existing congestion on the Chicago Junction's tracks. That circumstance, assuredly, renders the argument untenable. For, just so long as the Chicago Junction's motive power is inadequate and continues to dwindle, so long as that carrier disables itself by a labor agreement from rendering efficient service, so long as that carrier discriminates in its granting and withholding of trackage rights, so long as that carrier permits foreign engines and crews to roam at large on its tracks without even a pretense at regulation, and so long as the Union Stock Yards' obstructive rules add to the difficulties of making deliveries, it will take more than simple assertion to establish the truth of the railroad appellees' proposition that "under the existing physical conditions the customary method of making delivery to the stockyards has become the only reasonable and practical method of making delivery within the stockyards area."

For another, the foregoing argument completely, and again conveniently, ignores the discriminatory covenant whereby the lessee of the Chicago Junction is bound to operate that road for "the benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards. For, unless the New York Central sees to it that livestock is delivered to the Union Stock Yards and is not delivered to sidetracks, the Union Stock Yards derive no revenue from the operation. Thus, in order to comply with the covenant, the New York Central is bound to discourage sidetrack delivery. It does so, *inter alia*, by asserting that stockyards delivery, which subjects livestock to the payment of non-transportation charges, is the sole practical means for delivery of that commodity.

Yet, significantly enough, when Swift was still availing itself of this same allegedly "only reasonable and practical method of making delivery", by consigning its direct shipments to itself at the Union Stock Yards, it was the same railroads, represented by the same counsel, which insisted that such delivery should be subjected to yardage charges for non-transportation services, so that the consignee would in effect be obliged to ransom his own property. See Brief on behalf of appellees Alton Railroad Co. et al., in No. 595, Oct. T. 1941, *Swift & Co. v. United States*, 316 U. S. 216, 217, filed by Kenneth F. Burgess and Douglas F. Smith, Esqs.<sup>26</sup> That is to say, (a) the railroads argued in the egress case that the consignee shipping his own livestock to the Union Stock Yards should not be permitted to receive that property without paying yardage charges for unwanted non-transportation services; (b) the railroads now argue here that the delivery of livestock at the Union Stock Yards is "the only reasonable and practical method of making delivery within the stockyards area"; but (c) the railroads have yet to point out any means whereby the consignee of direct livestock at Chicago may obtain his property at his own sidetrack at the flat line-haul rate, which is the method and rate universally applicable everywhere else in the country (Ex. 10 at R. 1063-1069; Ex. 12, R. 1083-1090). To the contrary, the railroads assert (Motion to Affirm, p. 11) that "What appellant seeks here is a basis

<sup>26</sup> Swift's complaint in the egress case before the Commission was brought against 23 railroads (R. 24-25, No. 595, Oct. T. 1941). Seventeen of these, plus the Chicago River and Indiana Railroad, intervened and answered in the district court (R. 62-65, 70-74, No. 595, Oct. T. 1941). Fourteen of these same intervening railroads are now parties to the present cause (R. 97-98), and the other four are represented as follows: (a) The Alton Railroad, an intervener in the egress case, was merged in 1947 with the Gulf, Mobile & Ohio R. R. Co. (see *Moody's Manual, Railroads*, 1951, p. 463), which is an appellee here. (b) The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., and the Michigan Central, both of which were interveners in the egress case, are both leased by the New York Central (*id.* pp. 1051, 1054), an appellee here. (c) The Pere Marquette, an egress case intervener, was merged in 1947 with the Chesapeake & Ohio (*id.*, p. 745), an appellee here. Thus every railroad interest represented in the egress case is represented in this case.

of rates for private track delivery that would place it in a preferred position over any other Chicago packer desiring that character of service."

The common denominator in all of these contentions made by the railroads is that they require the conclusion that direct shipments of livestock at Chicago must go to the Union Stock Yards and must there be subjected to yardage fees. This result, obviously, inures to the "benefit, advantage, and behoof of the business and affairs of the Yards." Thus the very terms of the arguments made by the railroads in the egress case and in this case constitute additional proof of the paralyzing effect on commerce of the covenant between the Union Stock Yards and the lessee of the Chicago Junction.

Finally, the quoted argument completely fails to explain how the particular development of an industrial area, or the structure of a particular railroad plant, or the part which particular consignees have played in such development or in producing such a structure, can justify or excuse, or sanction or grant dispensation from palpable discriminations in violation of a statute, here the Interstate Commerce Act, whose primary target for over two generations has been the evil of discrimination.

What the railroad appellees are saying boils down to this—and we submit it as an accurate paraphrase of the quotation from their district court brief just set out—that since Swift and the other packers, through their one-time interest in the Union Stock Yards, participated in bringing about the present situation, they are bound thereafter to accept it without complaint after they had been divested of that interest by command of the Sherman Antitrust Law, however much the continuation of that situation involves demonstrable discriminations in violation of the Interstate Commerce Act. This amounts in substance to a contention that the removal of a restraint on interstate commerce justifies the continuance of a discrimination in interstate commerce. That proposition, obviously, is not law—and

yet in substance it underlies the Commission's report, the district court's approval thereof, and the arguments now made here in support of both.

### CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, with directions to set aside the order of the Interstate Commerce Commission, and to remand the proceeding to that body with instructions to proceed according to law, and in conformity with the opinion of this Court.

Respectfully submitted.

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## APPENDIX A

## Pertinent Statutory Provisions

## 1. NATIONAL TRANSPORTATION POLICY (Act of Sept. 18, 1940, 54 Stat. 898)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

2. INTERSTATE COMMERCE ACT, AS AMENDED, PART I (49 U. S. C. 1 *et seq.*).

SEC. 1. (3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract,

agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

\* \* \* \* \*

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

\* \* \* \* \*

(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid,

on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad, may make complaint to the commission, as provided in section 13 of this part, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

SEC. 2. If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier

shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

SEC. 3.(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

\* \* \* \*

SEC. 15.(5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

### 3. SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT (5 U. S. C. 1009).

#### JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

4. FEDERAL TWENTY-EIGHT HOUR LAW (45 U. S. C. 71-74).

**Sec. 71. Transportation of animals; time of confinement; unloading for rest and feeding; unloading sheep**

No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time dur-

ing which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this chapter to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

**Sec. 72. Animals unloaded to be fed and watered by or at expense of owner, lien**

Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 71 of this title, but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

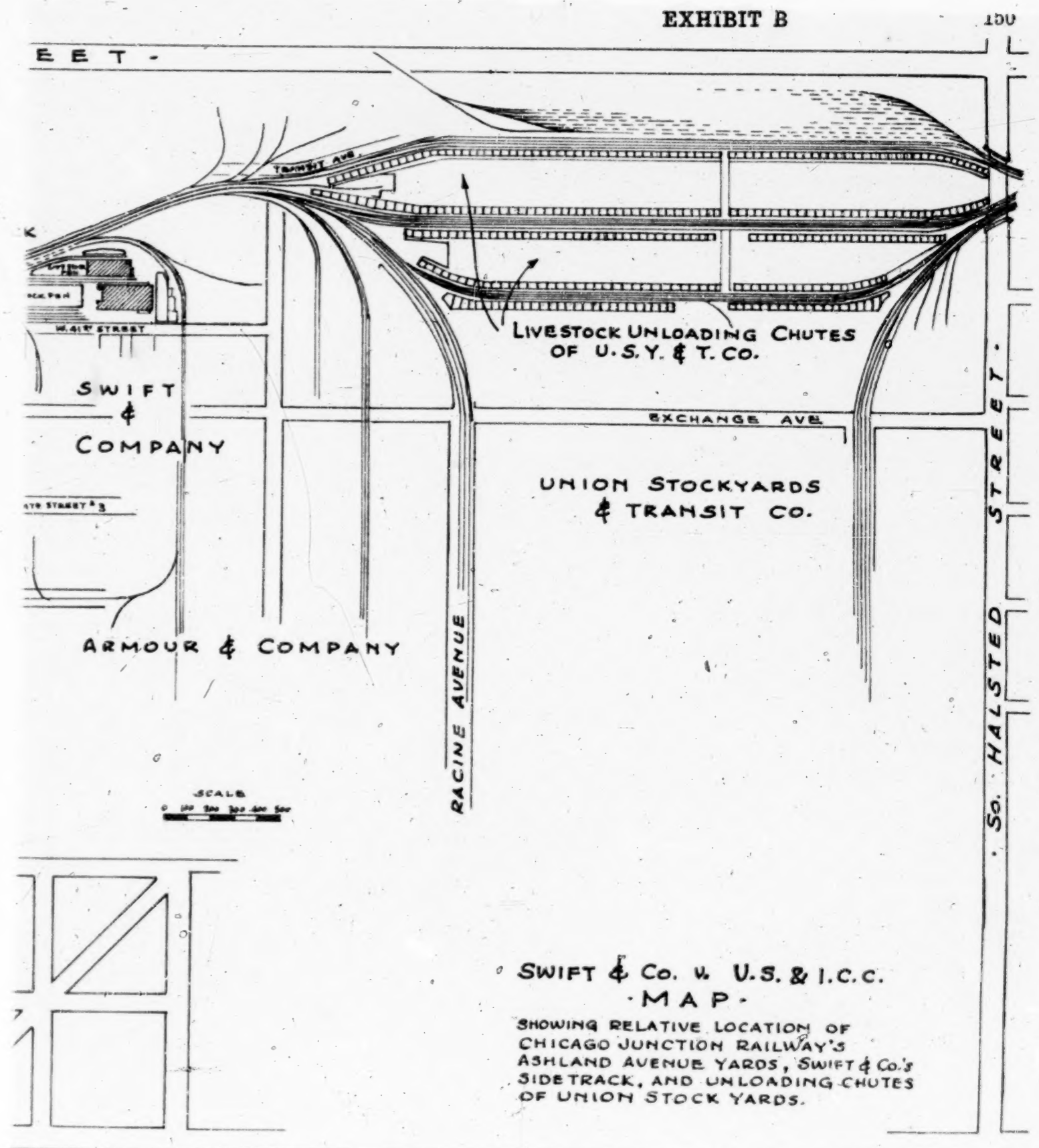
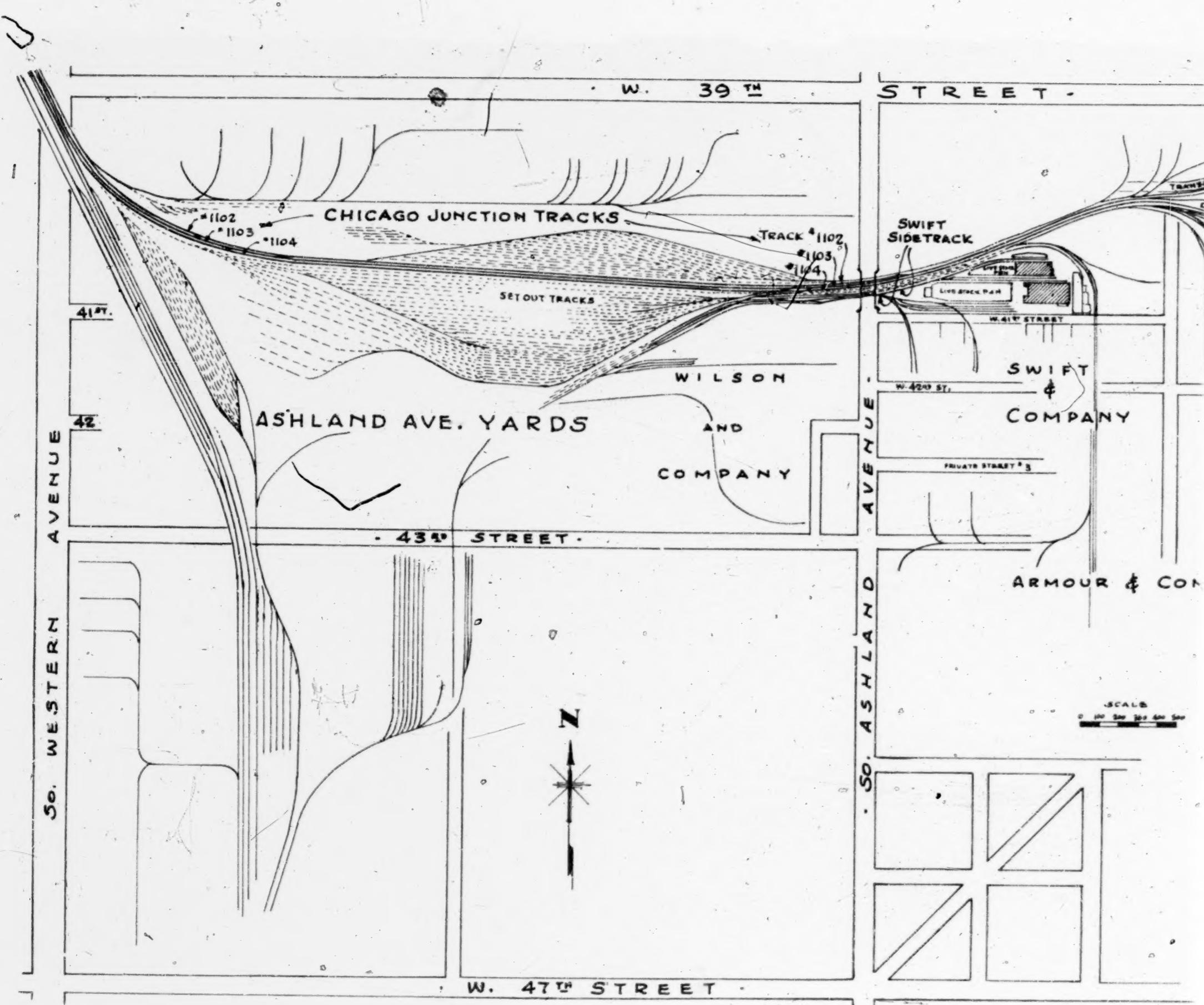
**Sec. 73. Penalty for failure to comply with law; when provisions for unloading not to apply**

Any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails

to comply with the provisions of sections 71 and 72 of this title shall for every such failure be liable for and forfeit and pay a penalty of not less than \$100 nor more than \$500: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

**Sec. 74. Penalty recoverable by civil action; duty of district attorneys to prosecute**

The penalty created by section 73 of this title shall be recovered by civil action in the name of the United States in the district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this chapter reported by the Secretary of Agriculture or which come to their notice or knowledge by other means.



SWIFT & Co. w. U.S. & I.C.C.  
MAP.  
SHOWING RELATIVE LOCATION OF  
CHICAGO JUNCTION RAILWAY'S  
ASHLAND AVENUE YARDS, SWIFT & Co.'s  
SIDETRACK, AND UNLOADING CHUTES  
OF UNION STOCK YARDS.